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REPORTS OF CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1902.

JANUARY TERM, 1903.

[UNOFFICIAL.]

VOLUME III.

LEE HERDMAN,

REPORTER.

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BY LEE HERDMAN, REPORTER OF THE SUPREME COURT,

In behalf of the people of Nebraska.

JAN 11 1911

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1902-1903.

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In the cases reported in this series the court has approved the conclusion reached, and adopted the recommendation made as a correct disposition of the particular case in which the decision is rendered. They are unofficial in the sense that the court has not necessarily approved all of the propositions of law advanced as indicated either in the syllabi or in the opinions themselves.

LAW ESTABLISHING THE SUPREME COURT COMMISSION.

**Laws, 1901, chapter 25, page 331.
Compiled Statutes, 1901, chapter 19, sections 22e to 22k.**

SECTION 1. The Supreme Court of this State, is hereby authorized to appoint by the unanimous vote and order of the Judges of said Court, nine (9) Commissioners of said Court and such stenographers as the Court may, from time to time, deem necessary for the aid of such Commissioners.

SECTION 2. No person shall be appointed as such Commissioner who is not a practicing lawyer in good standing, possessing the qualifications required for the office of Judge of the Supreme Court of this State, and none of said Commissioners shall practice law while holding such position.

SECTION 3. Each of said Commissioners and stenographers shall hold his position for the period of two years from and after his appointment, unless his appointment be withdrawn by the Supreme Court by the unanimous vote and order of the Judges thereof, before the expiration of said time.

* * * * *

SECTION 6. All vacancies occurring in the position of Commissioners or stenographers therefor, shall be filled in like manner as an original appointment.

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SECTION 8. Whereas, an emergency exists, this Act shall take effect and be in force from and after its passage and approval.

Approved March 19, 1901.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1902.

PRESENT:

HON. J. J. SULLIVAN, CHIEF JUSTICE.
HON. SILAS A. HOLCOMB,
HON. SAMUEL H. SEDGWICK, } JUDGES.

DEPARTMENT No. 1.

HON. WILLIAM G. HASTINGS,
HON. GEORGE A. DAY,
HON. JOHN S. KIRKPATRICK,

DEPARTMENT No. 2.

HON. JOHN B. BARNES,
HON. WILLIS D. OLDHAM,
HON. ROSCOE POUND,

DEPARTMENT No. 3.

HON. EDWARD R. DUFFIE,
HON. JOHN H. AMES,
HON. I. L. ALBERT,

} COMMISSIONERS.

GEORGE S. YAENAL ET AL. V. JAMES W. HUPP.

FILED MAY 8, 1902. No. 11,633.

Commissioner's opinion. Department No. 1.

- 1. Notaries: EVIDENCE OF OFFICIAL CHARACTER.** Signature and seal as a notary public sufficiently establishes, at least *prima facie*, the official character of notary of another state.
- 2. Mortgages: LIMITATION OF ACTIONS: NOTE BARRED: EFFECT ON MORTGAGE.** Amount due on a mortgage is not affected by the fact that an action on the note, which it secures, is barred by the statute of limitations.

Yarnal v. Hupp.

3. **Mortgage Foreclosure: INTEREST.** Where both note and mortgage provide for ten per cent. per annum interest after maturity, such agreement fixes the interest to be allowed on foreclosure.

ERROR from the district court for Red Willow county. Tried below before NORRIS, J. *Affirmed.*

S. R. Smith, for plaintiffs in error.

W. S. Morlan, *contra*.

HASTINGS, C.

Plaintiff in error in this case complains that there was error in refusing to suppress a deposition of one George W. Bawden; error in admitting in evidence the note, assignment, mortgage and coupon on which the action of foreclosure is based; error in the amount found due on them; error in allowing the interest at ten per cent. on the note and mortgage after the note was barred by the statute of limitations. The other assignments merely repeat these in general terms.

With regard to the deposition, the grounds for its suppression are that the notary's certificate does not state the source of his authority; that it does not recite his appointment as a notary public and that the deposition contained no venue. The last is not true, as its venue in Scott county, Iowa, is distinctly indicated in at least two places. The certificate recites that he is a notary public and indicates the date of expiration of his commission and is authenticated by his seal. It is not thought any further recital of his appointment as notary was needed.

The basis of the claim of error in admitting the papers is not disclosed. They seem to be sufficiently identified. Their execution, while denied in one place in the answer, is manifestly admitted elsewhere, and there is no real question concerning them. It seems unnecessary to consider them further.

The other errors are predicated upon the proposition that while action upon the mortgage in question was not barred by the statute of limitations, an action upon the

Omaha Loan & Trust Co. v. Borders.

note was. The note, by its face, fell due September 1, 1891; the action was begun December 31, 1898; the court found due \$1,236; the principal sum secured by the mortgage was \$700; there was one unpaid coupon, also dated September 1, 1891, for \$24.50; the note contained a proviso that should any of said principal or interest not be paid when due, it will bear interest at ten per cent. from the time it became due; the rate of interest of the original loan was seven per cent.

It is conceded that the action on the mortgage was not barred. No authority is cited for the proposition that the fact of the statute of limitations having run against the note would prevent a recovery of interest in accordance with the terms of the mortgage. It would seem that if any recovery at all is allowed upon this instrument, it should be such as the instrument provides for. The rate of interest called for in this mortgage is ten per cent. per annum after maturity. This was allowed by the district court, and in this we see no error. *Connecticut Mutual Life Insurance Co. v. Westerhoff*, 58 Neb., 379.

It is recommended that the decree of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

OMAHA LOAN & TRUST COMPANY, APPELLEE, v. JOHN H. BORDERS, APPELLANT, IMPEADED WITH ANNA BORDERS ET AL., APPELLANTS.

FILED MAY 8, 1902. No. 11,660.

Commissioner's opinion. Department No. 2.

1. **Mortgage Foreclosure:** DEDUCTING LIENS IN PRESENCE OF APPRAISERS. The fact that the officer has the certificates of prior liens in his possession at the time of the appraisal of real estate under an order of sale and calls the attention of the other two appraisers thereto, but does not deduct the amount thereof from the value of the land until after they separate, does not render the appraisal void.

Omaha Loan & Trust Co. v. Borders.

2. Mortgage Foreclosure: ATTACKING APPRAISAL AFTER SALE: FRAUD.

The appraisement of lands made for the purpose of a judicial sale can not be attacked after such sale, except on the ground of fraud. *Insurance Co. of North America v. Ackerman*. 61 Neb., 312, 85 N. W. Rep., 287, approved and followed.

APPEAL from the district court for Buffalo county.
Tried below before SULLIVAN, J. *Affirmed.*

J. M. Easterling, for appellants.

E. H. Scott, contra.

BARNES, C.

This case comes here on appeal from the order of the district court for Buffalo county confirming a judicial sale of real estate to satisfy a decree of foreclosure.

1. The only objection to the order confirming the sale which is discussed in appellants' brief is that the amount of the prior liens was not deducted from the appraised value of the land at the time the appraisers were together appraising the same, but that such deduction was afterwards made by the deputy sheriff, the officer who had charge of the appraisement. The evidence taken upon the hearing in the district court shows that the value of the land was fixed by the deputy sheriff and the two resident freeholders while together acting as appraisers; that the officer had in his possession and exhibited to the other two appraisers the certificates of liens, showed them the amount thereof, and told them that it would be deducted from the value they had placed upon the land; that they all thoroughly understood the matter at the time; that afterwards and before the sale such deduction was made by him. We think that this in no manner invalidated the sale. This disposes of the objection urged, and the district court was right in overruling it and confirming the sale.

2. The record shows that no objections were made to the appraisal until long after the sale had taken place, and therefore, if there was any merit in the objection, it was made too late to be available. After sale the appraise-

Sutton Exchange Bank v. Grosshans.

ment can not be successfully attacked except on the ground of fraud. *Insurance Co. of North America v. Ackerman*, 61 Neb., 312, 85 N. W. Rep., 287.

There is no claim of fraud in the objection herein, and we recommend that the order appealed from be affirmed.

OLDHAM and POUND, CC., concur.

AFFIRMED.

SUTTON EXCHANGE BANK V. CHRISTIAN GROSSHANS.

FILED MAY 8, 1902. No. 11,665.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: FINALITY OF VERDICT.** The verdict of a jury upon questions of fact submitted to them is final, unless such verdict is clearly and manifestly wrong.
2. **Appeal and Error: CONFLICTING EVIDENCE: VERDICT: PRESUMPTIONS.** Where the evidence is conflicting, and the court, upon a careful examination of it, is unable to say that a verdict based thereon is clearly and manifestly wrong, the presumption is that the jury, in their deliberations, were uninfluenced by passion or prejudice, and that they acted from proper motives, and unless there is some proof in the record to the contrary, the verdict will not be disturbed.

ERROR from the district court for Clay county. Tried below before HASTINGS, J. *Affirmed.*

Thomas H. Matters, for plaintiff in error.

R. G. Brown, *contra*.

BARNES, C.

This case was tried in the district court for Clay county, and was a suit brought by the plaintiff in error to recover from the defendant in error the sum of \$200, with interest thereon, upon a promissory note given by the defendant to the plaintiff, dated March 6, 1897, and due September 1, of the same year. The petition was in the usual form. The answer thereto first admitted the execution of the

Sutton Exchange Bank v. Grosshans.

note, and second, alleged that the original indebtedness accrued between the parties in the year 1891; that the defendant was indebted to one M. Tessier in the sum of \$100; that on the 4th day of March, 1890, he gave a note to said Tessier for that sum; that when the note became due it was at the plaintiff bank, and was apparently owned by the plaintiff; that he renewed the same and paid interest thereon at the rate of fifteen per cent. per annum; that from that time until he made the note in the suit there had been a renewal note given practically every three months; that from time to time he had paid interest to the plaintiff at the rate of fifteen per cent. per annum on the transaction, and that there was an agreement between the plaintiff and himself by which he was to pay and the plaintiff was to receive usurious interest, to wit, interest at the rate of fifteen per cent. per annum for the forbearance of the debt evidenced by the original note and the several renewals thereof; that between the date of the first renewal of the original M. Tessier note and the time of giving the note in suit the defendant had, under his agreement to pay usurious interest, paid to the plaintiff from time to time upon the said indebtedness various sums of money, amounting in all to \$231.60; that he refused to pay the note in suit because he had thus paid more than the principal sum thereof. The answer concluded with a prayer that the defendant be dismissed without day. For reply to this answer the plaintiff filed a general denial. The cause was tried and the jury returned a verdict for the defendant. A motion for a new trial was filed, argued and overruled, judgment was entered for the defendant upon the verdict, and the plaintiff brings the case to this court by a petition in error. There are but two assignments of error presented for our consideration.

1. The plaintiff contends that the verdict is not sustained by sufficient evidence. This requires an examination of the bill of exceptions and a review of the evidence contained therein. On the trial the defendant testified that soon after the Tessier note became due in 1891 he

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received a notice from the plaintiff that he must come in and pay it; that he went to the bank and Mr. Woodruff, its cashier, renewed the note; that he renewed it each ninety days, or thereabouts, from that time until he gave the note in suit; that sometimes he paid the interest and sometimes it was included in the new note; that the bank always charged him fifteen per cent. interest for the use of the money represented by this transaction; that he kept a memorandum of the amounts paid to plaintiff from the time of the first renewal; that he knew the amount he had paid on this indebtedness, which was \$231.60, he gave specific dates and amounts of payments, except as to \$76.25 thereof, which he testified he paid in different sums from time to time during the years 1893, 1894 and 1895; that he had lost the memorandum of the dates and amounts of the payments going to make up this particular sum. He further testified that the renewal notes varied in amounts, for the reasons that sometimes he paid the interest in cash and sometimes it was added to the sum due; that the note in suit was for the amount thus obtained; that after the year 1891 he had no dealings with the plaintiff other than those relating to the Tessier note. His testimony as to these matters was direct and positive. He introduced in evidence certain exhibits, and further testified that they were not all of the notes which he gave, he having lost a large number of the renewal notes which he had taken up from time to time. The plaintiff produced as a witness one J. C. Merrill, its president, who testified, in substance, that the bank never owned the Tessier note; that it had this note for collection; that defendant borrowed the money of plaintiff to pay it off and gave his note to plaintiff for \$117.30 therefor; that the bank paid Tessier the amount due on his note, which was \$113, retaining \$1 for collecting it; that the \$117 note was renewed from time to time until December, 1894, when defendant paid it. He also testified that defendant had paid the bank a \$1,200 note given by his brother, and which he had signed as surety; that at one time defendant wanted to borrow \$200

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of the bank, but he declined to loan it to him; that Mr. Woodruff, the cashier, did loan him some money, he did not know how much; that one time witness loaned defendant \$25 for thirty days, which was paid when due; that they always charged the defendant from ten per cent. to fifteen per cent. interest on the money represented by their transactions with him. He also testified that the Tessier note had nothing to do with the note in suit. J. J. Oxner, at one time plaintiff's cashier, testified that defendant borrowed money from the bank to pay the Tessier note with, and repaid it in March, 1894, this statement as to payment being in conflict with the testimony of the witness Merrill; that at one time defendant wanted to borrow \$200 of the bank, but he told the defendant that they were not loaning money then; that Mr. Woodruff, then plaintiff's cashier, let defendant have some money, witness did not know how much, but that the note therefor was made for \$225. Tessier testified that his note for \$100 was paid to him by defendant in the bank. The plaintiff's witnesses did not deny that the payments of money, which defendant testified he had made on account of the transaction out of which the note in question accrued, were made as stated by him. The books were not introduced in evidence, and to our minds the matter was left in a rather unsatisfactory condition, so far as the testimony is concerned. The books of the bank without doubt would have shown the transaction from beginning to end, including each and every renewal of the original note; but they were not produced or introduced in evidence, and no sufficient reason is given why they were withheld. The jury found for the defendant; they also, by a special verdict, found that the transactions were usurious, and on this point there was no conflict of evidence. The plaintiff's witnesses frankly stated that they charged the defendant fifteen per cent. interest per annum. The jury further found that the amount originally loaned defendant was \$117.30; that there had been paid on the loan, of which the note in question formed a part, the sum of \$231.60; that the payment

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of the Tessier note by the execution of the note for \$117.30 and by the renewals thereof made a part of the consideration of the note sued on. We are unable to say that these findings are clearly wrong. We should not substitute ourselves in the place of the jury as triers of the facts. They saw the witnesses, heard their evidence, observed their demeanor and conduct upon the trial, and were therefore better able to determine the facts than this court acting as a court of review. We are constrained to hold that the evidence is sufficient to sustain the verdict, and we are unable to say that it was clearly and manifestly wrong. In such case the verdict of the jury will not be disturbed. *Rolf v. Pilloud*, 16 Neb., 21; *Woods v. Hart*, 50 Neb., 497; *Stewart v. Smith*, 50 Neb., 631. These facts being established, it follows that plaintiff was entitled to recover only the sum of \$117.30 without interest, and that the payments more than extinguished the original debt. The general verdict of the jury was therefore right, and should be sustained.

2. Plaintiff contends that the jury were influenced by passion and prejudice in arriving at their verdict. A careful examination of the record and all of the evidence fails to disclose anything which, to our minds, sustains this assignment of error. Where the evidence is sufficient to sustain the verdict, in absence of any evidence to the contrary, it will be presumed that the jury were uninfluenced by passion or prejudice, and that their actions and deliberations were based upon proper motives. Therefore the findings upon the questions presented to them by the evidence should not be set aside.

It follows that the verdict and judgment in this case must be sustained, and for the foregoing reasons we recommend that the judgment of the district court be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

Moore v. Heltzel.

MRS. D. L. MOORE ET AL. V. SARAH E. HELTZEL.

FILED MAY 8, 1902. No. 11,674.

Commissioner's opinion. Department No. 2.

Forcible Entry and Detainer: RIGHT OF APPEAL. No appeal lay to the district court from the judgment of the county court in proceedings in forcible entry and detainer prior to the enactment of chapter 85, Laws of 1901. *Armstrong v. Mayer*, 60 Neb., 423, followed.

ERROR from the district court for Nuckolls county. Tried below before SORNBORGER, J. *Affirmed.*

H. H. Mauck and *W. A. Bergstresser*, for plaintiffs in error.

S. A. Searle, contra.

OLDHAM, C.

This was an action of forcible entry and detainer originally begun in the county court of Nuckolls county, Nebraska. At the trial in the county court plaintiff had judgment, and defendants appealed from said judgment to the district court of said county. When the cause was docketed in the district court plaintiff filed a motion to dismiss defendants' appeal. This motion was sustained by the district court, and defendants bring error to this court.

Under the decision of this court in the case of *Armstrong v. Mayer*, 60 Neb., 423, the action of the trial court in dismissing defendants' appeal was right and should be affirmed, and we so recommend.

BARNES and POUND, CC., concur.

AFFIRMED.

Levy v. Hinz.

MORRIS LEVY, APPELLEE, V. CHARLES HINZ ET AL., APPELLANTS.

FILED MAY 8, 1902. No. 11,680.

96 MAY 6 40
Commissioner's opinion. Department No. 2.

1. **Mortgage Foreclosure: EXAMINATION OF PROPERTY BY APPRAISERS: FRAUD.** The fact that the appraisers did not examine the interior of a house upon property to be sold under decree of foreclosure does not prove of itself that they acted fraudulently in making the appraisement.
2. **Mortgage Foreclosure: OBJECTION TO NOTICE FOR IRREGULARITIES IN DECREE.** A notice of sale which follows the decree in stating the claims for satisfaction whereof the land is to be sold is not open to objection. Irregularities or errors in the decree must be corrected as such.
3. **Mortgage Foreclosure: CONFLICTING EVIDENCE: IRREGULARITIES.** Where irregularities in the conduct of a judicial sale are charged, the finding of the district court on conflicting evidence will not be disturbed unless clearly wrong.

APPEAL from the district court for Douglas county.
Tried below before FAWCETT, J. *Affirmed.*

Geo. W. Cooper, for appellants.

Wharton & Baird, contra.

POUND, C.

This appeal from an order confirming a sale of real property under decree of foreclosure, like most of its kind, may be disposed of very quickly. The objections to the appraisement were not made till after sale, and hence come too late. Counsel seeks to avoid this well-settled rule by claiming that the evidence he adduced showing that the appraisers did not examine the interior of a house upon the property to be sold is proof that the appraisement was made fraudulently. But it is manifest that such fact could at most be a circumstance to be considered, in connection with all the other facts in evidence,

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upon an issue of fraud. Of itself, it does not prove fraud, nor would it even, of necessity, be an irregularity.

Objection is made to the notice, in that it recites that the land was to be sold, among other things, for satisfaction of a certain judgment lien. This judgment was described as a second lien on one parcel and a third lien on another, upon which a homestead right of one of the defendants was said to be a second lien to the amount of \$2,000. Whatever may be thought of this mode of stating the manner in which the surplus, if any, over and above the amount of the first mortgage lien was to be disposed of, the notice followed the language of the decree, and stated the claims for satisfaction whereof the land was to be sold in the same way as the order under which the proceeding was had. If the decree was erroneous or irregular, the errors or irregularities therein should have been corrected as such. The notice is not open to objection.

Finally, it is urged that the sheriff conducted the sale in an irregular and improper manner. The evidence on this point is conflicting, and we should not be justified in disturbing the finding of the district court unless clearly wrong. We see no reason to think that it was not right, and recommend that the order appealed from be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

MARY HARRIETT FORT ET AL., APPELLANTS, V. FRANK M. COOK ET AL., APPELLEES.

FILED MAY 8, 1902. No. 11,704.

Commissioner's opinion. Department No. 1.

Homestead: RIGHTS OF HEIRS UNDER THE STATUTE. The words "his or her heirs," as used in section 17 of chapter 36 of the Compiled Statutes of Nebraska, refer to the heirs of the decedent and not to those of the survivor. *Schuyler v. Hanna*, 31 Neb., 307, followed.

APPEAL from the district court for Otoe county. Tried below before FAWCETT, J. *Affirmed.*

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Andrew E. Harvey, for appellants.*Edwin F. Warren*, contra.

HASTINGS, C.

On January 5, 1882, Mary Freeman died seized in fee of the northeast quarter of section 33, township 9, range 9, Otoe county, Nebraska. At the time of her death she was occupying the premises as a homestead in connection with her husband, Silas M. Freeman, and a son by a former marriage, Edmund M. Cook. The husband and son continued to reside on the premises until August, 1898, when the son died, unmarried. The husband remained in possession until March 15, 1899, when he, too, died. The defendants, Frank Cook and the heirs of George Hollister, claim to be in possession of the lands as heirs of Edmund M. Cook. Plaintiffs are heirs of Silas M. Freeman; the basis of their claim is section 17 of chapter 36, Compiled Statutes, providing for succession by inheritance of a homestead.

The section, so far as it is material to this controversy, is as follows: "If the homestead was selected from the separate property of either husband or wife it vests, on the death of the person from whose property it was selected, in the survivor for life and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same except the life estate of the survivor by will." The question is simply whether the "his or her heirs" in the above statute are the decedent's or are those of the survivor. Plaintiffs claim as heirs of the surviving husband, defendants as heirs of the wife's son who outlived her. The question has been ably argued with abundance of citations, but it seems to have been decided in *Schuyler v. Hanna*, 31 Neb., 307, and decided adversely to plaintiffs' claim. Counsel for plaintiffs urges that the reference to this question in *Schuyler v. Hanna* is mere *dictum* and not necessary to the decision of that case, and also states that this particular point was not raised nor discussed at

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that hearing in briefs. In the latter statement, at all events, he is mistaken. In that case appellant did urge the interpretation of the statute claimed by plaintiffs here, and did so in the concluding section of the brief. It is true that in that case the counsel for appellant urged at greater length another view of the statute and endeavored to show that his case was good even under the view taken by the defendants in this case. The present plaintiffs' view was also urged, however, and was material to the decision.

In *Schuyler v. Hanna*, the son of a deceased husband, in whose name the title to a homestead occupied by himself and wife stood, made a conveyance after his father's death by quitclaim deed of his interest in the homestead then held and occupied by his mother. Subsequently the son died and the mother also. The son's wife claimed an interest in the premises, notwithstanding the quitclaim deed, on the ground that it was an after-acquired estate which vested in her and the son's children on the death of the mother and was not conveyed away by the quitclaim deed which had been made prior to the mother's death. It was evidently necessary to decide whether the son who had made a quitclaim deed received his interest in the homestead property as the heir of his father or as an heir of his mother. If the latter, the estate had not devolved at the time of the quitclaim deed and would not pass by it. If the former, as this court held, then the estate devolved upon him as a vested remainder on his father's death, subject only to his mother's life interest. In deciding the case the court held that the plain intention and meaning of the statute made the words "his or her heirs" refer back to the decedent and that they do not refer to the "survivor," although the latter is the nearer. This holding is not a mere *dictum*; it is clearly necessary to the determination of the cause. If the son made a quitclaim deed of property in which his only interest was that of an heir of a person still living, he conveyed nothing. Such a person has no interest which he can convey. "But if the contin-

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gency is in the person who is to take, as where the remainder is limited to the heirs of one now alive, there is no one who can make an effectual grant or devise of the remainder." 2 Washburn, Real Property [6th ed.], page 527. The question involved in this case must, therefore, be considered as having been decided in *Schuyler v. Hanna*.

It should perhaps be added that we have no disposition to disturb the conclusion reached in that case. Counsel's sole argument in favor of the opposite determination asked for is the grammatical doctrine that the pronoun should be held to refer to the nearest antecedent. This is by no means universally true. It is merely one of the *indicia* of the writer's meaning. "A relative word will not be read as representing the last antecedent exclusively, where the sense of the context and clear intention of the law-maker requires it to represent several or one more remote." Sutherland, Statutory Construction, page 340. *Gyger's Estate*, 65 Pa. St., 311; *Williams v. Evans*, L. R., 1 Ex. Div. [Eng.], 277; *Fisher v. Connard*, 100 Pa. St., 63; *Kelley's Heirs v. McGuire*, 15 Ark., 555; *State v. Jernigan*, 3 Murphy [N. Car.], 18; *Simpson v. Robert*, 35 Ga., 180.

If the principal question in this case had not been settled in *Schuyler v. Hanna*, we should not feel compelled, merely by the fact that the word "survivor" is the nearest antecedent, to hold that the legislature intended to absolutely disinherit the heirs of the owner of property in order to give it to the heirs of one whose interest is in the same statute expressly limited to a life estate.

It is recommended that the decree of the trial court in favor of the defendants be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

Druse v. Davey.

MARCELLA DRUSE, APPELLEE, v. NANNIE DAVEY, APPELLANT.

FILED MAY 8, 1902. No. 11,716.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: EVIDENCE SUPPORTING FINDINGS.** The supreme court, though trying a case *de novo* on appeal, will not disturb the finding of the district court, unless the finding and decree can not be reconciled with any reasonable construction of the testimony. *Gadsden v. Phelps*, 37 Neb., 590, followed.
2. **Appeal and Error: SUFFICIENCY OF EVIDENCE: RECOVERY OF TAXES PAID.** Evidence examined, and held to support the finding and decree.

APPEAL from the district court for Lancaster county.
Tried below before HOLMES, J. *Affirmed.*

S. B. Pound, for appellant.

Halleck F. Rose and *Wilmer B. Comstock*, *contra.*

DAY, C.

On April 19, 1897, Nannie Davey, the appellant, conveyed by warranty deed to Marcella Druse, the appellee, lot 17, in block 59, in the city of Lincoln. The deed contained the usual covenants against incumbrances. At the time of the conveyance certain street and alley paving taxes, amounting in the aggregate to \$364.31, were valid and subsisting incumbrances upon the lot so conveyed. These taxes were paid by the appellee, who brought this action to recover from appellant the amount thereof, based on a breach of the covenants in the deed.

The appellant's answer, among other things, alleged that the incumbrance upon the lot for the unpaid paving taxes was to be excepted from the covenants of the deed against incumbrances; that such was appellant's intention, which was well known to the appellee, that appellee's husband undertook to draw the deed in accordance with this agreement and understanding, but by mistake, or with the intent to defraud appellant, did not except the paving

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taxes from the covenant against incumbrances; that appellant signed and delivered the deed to appellee believing that it contained the agreement of the parties and relying upon the representations of the appellee's husband that it was drawn in accordance with their agreement. The appellee also prayed that her deed be reformed so as to except from the covenant against incumbrances the paving tax liens. The reply denied these allegations of the answer. Upon the trial the court found in favor of the plaintiff generally and rendered judgment in her favor for \$205.31. This judgment included all of the taxes against the property at the time the deed was executed except the last two paving assessments, aggregating \$158. To review this judgment the defendant brought the case to this court by appeal.

There was but little testimony offered by the appellant in support of her theory that there was either fraud or mistake in the drafting and execution of the deed, and this was directly contradicted by the evidence of two witnesses. It is now well settled that this court, although trying a case *de novo* on appeal, will not disturb the finding of the district court unless the finding and decree can not be reconciled with any reasonable construction of the testimony. *Gadsden v. Phelps*, 37 Neb., 590; *Swartz v. Duncan*, 38 Neb., 782; *Johnson v. McLennan*, 43 Neb., 684. The trial court evidently regarded a letter written by appellee's agent to appellant as an agreement on the part of appellee to pay the last two payments of paving taxes and deducted said payments amounting to \$158 from the sum appellee would otherwise have been entitled to recover. This finding is as favorable to appellant as any possible construction of the record would warrant.

From a careful examination of the record we are constrained to the view that the finding and judgment of the trial court is amply sustained by the evidence, and we therefore recommend that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

First Nat. Bank of Sutton v. Ashley.

FIRST NATIONAL BANK OF SUTTON, APPELLEE, v. WILLIAM
H. ASHLEY ET AL, APPELLANTS.

FILED MAY 8, 1902. No. 11,749.

Commissioner's opinion. Department No. 3.

Mortgage Foreclosure: APPRAISAL: DEDUCTION OF INTEREST ON PRIOR LIEN: PREJUDICE. A tract of land was incumbered by three mortgages, the first mortgage being for \$2,400. In a proceeding to foreclose the second mortgage a decree was entered finding the amount due thereon and establishing it as a second lien on the premises, subject only to the lien of the first mortgage for \$2,400, "with the accrued interest thereon." Prior to the sale the court directed the sheriff to include in the appraisement as a "prior incumbrance" the sum of \$1,138.67 as interest due on the \$2,400 mortgage, and the appraisement, as thus amended, showed the defendant's interest in the land to be \$628.11. The land sold for \$500. The defendant filed objections to the appraisement and to the confirmation of the sale, and made a showing that the interest due on the \$2,400 mortgage was \$1,100 only. *Held*, That conceding that the court had no authority to make the order which it did relating to the appraisement, yet, as the land sold for more than two-thirds of its appraised value, counting the interest on the first mortgage at \$1,100 only, the defendant was not prejudiced thereby.

APPEAL from the district court for Clay county. Tried below before HASTINGS, J. *Affirmed*.

Wm. M. Clark, for appellants.

Thomas H. Matters, *contra*.

DUFFIE, C.

June 2, 1899, a decree of foreclosure was entered in this case. One John S. Thompson was made a party defendant to the action as a prior mortgagee, but was not served with summons and did not appear to the action. The decree found that there was due the First National Bank of Sutton upon its mortgage the sum of \$667, with ten per cent. interest, which was a second lien upon the premises, subject only to the lien of the mortgage given to

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John S. Thompson for \$2,400, together with the accrued interest thereon. The court also established a third lien in favor of S. W. Christy, executor, which it is not necessary to notice further. An order was entered directing a sale of the mortgaged premises, the proceeds to be used (1) to the payment of costs; (2) to the claim of the First National Bank of Sutton; (3) to the claim of S. W. Christy. No order was made relating to the Thompson mortgage except the finding that it was a first lien on the mortgaged premises. March 16, 1900, an order of sale was issued upon said decree. March 22, 1900, the appraisers filed their report, and on the same day the following order was made by the court: "This cause coming on for hearing, now comes the plaintiff in open court and requests the court to have the sheriff include in prior incumbrances the sum of \$1,138.67, interest due on the \$2,400 mortgage; upon consideration whereof the court doth allow said request of plaintiff. It is therefore ordered by the court that the sheriff include in prior incumbrances interest in the sum of \$1,138.67, to which ruling of the court defendant excepts."

The appraisement of the property showed the defendant's interest therein to be \$628.11 after deducting prior incumbrances, including the \$1,138.67 referred to in the order of the court of March 22. April 24, 1900, the land was sold to the First National Bank of Sutton for the sum of \$500. The defendant, Ashley, filed objections to the appraisement prior to the sale, and after the sale objected to the confirmation, the principal objection, and the only one having any merit, being the order of the court directing the sheriff to include the sum of \$1,138.67 due on the \$2,400 mortgage held by Thompson as a prior incumbrance. It is urged by the defendant, with great force, we confess, that appraisers act judicially and that the court has no power to order a change in the appraisement made and returned by them. That the appraisement of property to be sold on execution or under a decree of foreclosure is to some extent placed within the supervision of

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the court, can not be denied. The court may, upon a proper showing, set it aside and direct another appraisal to be made. That it may order an amendment or change in the appraisal unless the appraisers themselves apply for leave to amend, we very much doubt. That the court ordered this appraisal to be amended is clear from the record. Upon what showing this order was made does not appear, and, in the absence of the evidence upon which it acted, we must presume that it had authority to make the order which it did. That the appraisers themselves might amend their report before the same was filed is settled by the authorities. That they may amend by leave of court after the same is filed is also settled.

In 12 Ency. Pl. & Pr., 22, the rule is stated in the following language: "The appraisers may amend their return at any time before filing the same, and after filing when it can be done in accordance with the truth, and the rights of third parties have not intervened. It has been held that after the lapse of a number of years such amendment can not be made; nor will an amendment be permitted if the amended return would still be insufficient." The authorities cited in support of this rule fully sustain the text.

There is nothing in the record which shows that any interest upon the Thompson mortgage had been paid. In an affidavit filed on behalf of the defendants it is stated that the interest on the Thompson mortgage, if computed to the day of the order, amounted to \$1,100 only, and if computed to the date of the sale would amount to \$1,117. The interest of the defendant, as found by the amended appraisal, was \$628. As the land sold for \$500 it will be seen that it sold for more than two-thirds of its appraised value, conceding that the interest due on the Thompson mortgage was not more than shown by this affidavit. If so, Ashley was not in any way prejudiced by the order made and ought not to be allowed in an equity proceeding to take any advantage of an order, conceding

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that it was erroneously made, which did not in any manner prejudice his rights. *Watson v. Tromble*, 33 Neb., 450; *Drew v. Kirkham*, 8 Neb., at page 481.

There being no prejudicial error apparent in the record, we recommend that the judgment of the district court be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

FIRST NATIONAL BANK OF SUTTON, APPELLEE, v. WILLIAM
H. ASHLEY ET AL., APPELLANTS.

FILED NOVEMBER 19, 1902. No. 11,749.

Commissioner's opinion. Department No. 3.

Mortgage Foreclosure: DEDUCTION OF INTEREST ON PRIOR LIEN. The former opinion in this case, reported *ante*, page 18, and in 90 N. W. Rep., 639, adhered to.

REHEARING of case reported *ante*, page 18.

APPEAL from the district court for Clay county. Tried below before HASTINGS, J. *Former opinion of affirmance adhered to.*

Wm. M. Clark, for appellants.

Thomas H. Matters, *contra*.

ALBERT, C.

This case is before us on rehearing. The former opinion contains a full statement of the case, and is reported *ante*, page 18, and in 90 N. W. Rep., 639. The reargument develops nothing that was not fully discussed at the former hearing and fully considered by this division in reaching the conclusion in the opinion referred to. After the rehearing we are more than ever convinced that the

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conclusion heretofore reached is sound, and that the order of the district court should be affirmed.

We therefore recommend that the former opinion be adhered to and the order of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

WESTERN UNION TELEGRAPH COMPANY V. ELIZA CHURCH.

FILED MAY 21, 1902. No. 10,995.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: EXAMINATION OF WITNESSES: OBJECTION TO ENTIRE QUESTION, GOOD AS TO PART.** An objection to an entire question put to a witness calling for testimony, part of which is admissible and part inadmissible, is properly overruled, and error can not be predicated on such ruling.
2. **Appeal and Error: OBJECTIONS TO EVIDENCE NOT IN BRIEFS.** Objections to the admission of evidence made at the trial, but not argued or mentioned in briefs filed in this court, will not be considered.
3. **Evidence: EXPERT TESTIMONY: MEDICAL EXPERT.** The testimony of a medical expert is not objectionable as being conjectural and speculative, because it gives the opinion of such expert as to the probability of a physician's accomplishing a certain result in a given time if he had been in attendance upon a woman in confinement.
4. **Evidence: FAILURE TO DISCLOSE GROUND OF OBJECTION: APPEAL AND ERROR.** It is the duty of one objecting to a question asked a witness to state the grounds upon which he relies for the exclusion of the proffered testimony, so that the trial court may rule with such criticism in mind; and an objection based upon grounds not disclosed at the time such objection is made will be disregarded on appeal.
5. **Evidence: MEDICAL EXPERT: HYPOTHETICAL QUESTION: TIME OF OBJECTING.** An objection to the form of an hypothetical question asked of a medical expert on the ground that it permitted the witness to consider the subjective conditions in giving his opinion should be made at the trial or it will be unavailing.
6. **Telegraphs and Telephones: DAMAGES: KNOWLEDGE OF URGENCY.** The following telegram was delivered to a telegraph company for transmission to a physician: "Come at once to ———." It ap-

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peared that the professional character of the addressee was well known to the agents of the company at both the sending and receiving offices. *Held*, Sufficient to charge the company with knowledge that the telegram was urgent and required reasonable promptness in its delivery.

7. **Telegraphs and Telephones: DAMAGES: FAILURE TO DELIVER MESSAGE: MEASURE OF DAMAGES.** In an action against a telegraph company for negligent failure to deliver a telegram, the damages recoverable are such as flow naturally and directly from the failure of the company to deliver the telegram; or such as it may be deemed would have been in the contemplation of the parties had they, at the time the telegram was delivered for transmission, directed their attention to the probable and natural consequences of a breach on the part of the company.
8. **Telegraphs and Telephones: DAMAGES FOR PHYSICAL AND MENTAL SUFFERING, CAUSED BY FAILURE TO DELIVER MESSAGE.** Where, in an action against a telegraph company for failure to deliver a message summoning a physician to attend a woman in confinement, in consequence of such delay the physician does not arrive until after his services are no longer required, substantial damages may be recovered for any increased physical and mental suffering caused to the mother by reason of the physician's absence.
9. **Telegraphs and Telephones: DAMAGES FOR PHYSICAL AND MENTAL SUFFERING: AMOUNT NOT EXCESSIVE.** Where by reason of the delay in delivering such message the labor of a woman in confinement is unduly prolonged, a verdict for \$950 as damages for the additional suffering in body and mind on account of the physician's failure to attend is not so excessive as to be presumptively the result of passion and prejudice.

ERROR from the district court for Jefferson county.
Tried below before LETTON, J. *Affirmed.*

W. P. Freeman and W. W. Morsman, for plaintiff in error.

John Heasty, R. A. Clapp and W. H. Barnes, contra.

KIRKPATRICK, C.

This is an action brought in the district court for Jefferson county by Eliza Church, defendant in error, against the Western Union Telegraph Company, plaintiff in error, to recover the sum of \$1,990 as damages claimed to have been sustained on account of the failure of the telegraph

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company promptly to deliver a telegram which had been sent to a physician in the city of Fairbury to come to her home at once. The petition sets out that on the 28th day of January, 1898, she delivered to the telegraph company a message as follows: "Dr. Andrews: Come to L. C. Church's at once. L. C. Church."; that the telegraph company received the message at the village of Thompson and undertook to deliver the same promptly to Dr. Andrews at the city of Fairbury, which was distant seven or eight miles; that the company was paid for transmitting the message; that it was delivered to the company for transmission about the hour of 6 o'clock P. M., and that it was not delivered to Dr. Andrews until about the hour of 9 o'clock P. M. of the same day; that Dr. Andrews was a skillful and competent physician and surgeon, and that defendant in error had previously arranged with him to attend her during her confinement, which was expected to occur soon; that he had agreed to come immediately upon receiving notice; that upon receipt of the telegram Dr. Andrews started immediately for the residence of defendant in error, arriving there about 10 o'clock P. M., and after the birth of the child, which died during birth; that on account of the negligence and carelessness of the telegraph company she was prevented from having the care, attendance and assistance of a physician, and that her confinement was unduly prolonged; and that she suffered greatly in body and mind on account of not having the care and assistance of a physician, and that the period of labor was greatly lengthened, aggravated and intensified, all to her damage in the sum claimed. To this petition plaintiff in error filed an answer, admitting its corporate character, and that it owned and operated a telegraph wire between the village of Thompson and the city of Fairbury, and that it held itself out to the public as a common carrier of information; and further denied each and every allegation contained in the petition, together with an allegation that plaintiff's petition did not state facts sufficient to entitle her to any relief. Trial was had to a jury, which resulted

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in a verdict and judgment for defendant in error in the sum of \$950, to reverse which the cause is brought to this court.

Four assignments of error are argued in briefs of counsel for plaintiff in error, and they will be considered in their order: First, that the court erred in permitting Dr. Andrews, over objections, to testify that other telegrams had been sent to him which the company had delayed in delivering; that by reason of such delay, he had lost money, and that he had informed the agent of plaintiff in error that he wanted messages addressed to him delivered to him at once; that if they continued to hold messages they would be responsible for somebody's death, and that witness was losing money in having the telegraph company hold messages until they could find some person to deliver them to him; second, that the court erred in permitting Dr. Andrews, over objection, to testify that if he had arrived at the residence of defendant in error at about 8 o'clock in the evening, and found her in confinement and all of the child born except the head and one arm, he could in all probability have completed the delivery in three or four minutes thereafter; third, the court erred in permitting the jury to find more than nominal damages; fourth that the verdict is excessive.

The facts, as disclosed by the record, briefly stated, are as follows: Some time prior to January 28, 1898, defendant in error, expecting confinement soon thereafter, talked to Dr. Andrews about attending upon her at that time, and he agreed to come upon notice. On January 28, 1898, defendant in error caused to be delivered to the agent of plaintiff in error at its office in the village of Thompson the message hereinbefore set out. The message was forwarded by the company's agent at Thompson within a very few minutes after its receipt from the sender, and was received by the company's agent at Fairbury. Dr. Andrews was well known in Fairbury as a practicing physician and surgeon, and both his office and residence were within the free delivery limit established by the company.

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The message was not delivered to him until about 8:45 P. M. He immediately hitched his horse to his buggy and started for the residence of defendant in error, distant about seven miles, arriving there about 10 o'clock. It appears from the evidence that defendant in error was taken with premonitory labor pains about 3 o'clock in the afternoon. Soon afterwards she sent a young woman to the house of a neighbor woman, and then to the telegraph office with the message. Between 6 and 7 o'clock her pains became more violent and frequent, and about 8:30 the child was delivered. The birth was an instance of what is commonly called "foot presentation." After all of the body except the head and one arm was born, birth was delayed for about thirty minutes, and it seems that during this time the life of the child became extinct. At the time the doctor arrived, about 10 o'clock, defendant in error was in bed resting easily. He left a prescription and returned home. Defendant in error suffered intensely during the last half hour of her labor.

Dr. Andrews was called as a witness for defendant in error, and the following testimony by him is quoted from the record, as being the basis of the first assignment of error urged for consideration:

Q. Now you may state whether prior to that time you had received telegrams which had been transmitted to you from the defendant company?

A. Yes, sir.

Q. Many times?

A. Yes, sir.

Q. Have they been delivered to you by the defendant at your office prior to that?

A. Sometimes at the office and sometimes at my residence.

Q. You may state whether prior to that time you had had any talk with the defendant company with reference to delivering telegrams to you?

Objected to, as immaterial and incompetent. Overruled. Exception.

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A. I had explained to them in regard to the delay in the different telegrams sent to me and I lost money by that.

Q. (By attorney for defendant company.) Explained to whom?

A. To Mr. Catlin; there was a telegram sent to me, about three weeks I think before this time, from Reynolds; it was received here at 6 o'clock in the evening and delivered to me at 5 o'clock next day.

Objected to as not responsive to the question, and immaterial. Sustained.

Q. State what you said to him at that time about telegrams sent to you and what should be done with them?

Objected to, as immaterial. Overruled. Exception.

A. I told him I wanted telegrams sent to me immediately. I didn't want them to keep them at the office; that if they continued in this way they would be responsible for somebody's death, and not only was that true but I was losing money by telegrams being held until they could find somebody to bring them to me.

The testimony to which more particularly objection is urged in the briefs of counsel for plaintiff in error is that given to the last question quoted above. The testimony elicited by the questions immediately preceding, while it may have been objectionable, could not, we think, have resulted in prejudice to plaintiff in error. Regarding the last question, it may be said that no objection was made to its form, the only objection being that it was immaterial. Two inquiries were made in the question, first, "state what you said to him at that time about telegrams sent to you," and, second, "what should be done with them?" The first portion of the question would likely call for immaterial testimony and was objectionable; but the second portion called for any directions which the witness may have left regarding the delivery of messages to him, whether they were to be delivered at his office or residence, between what hours at either place, or any such instruction as may have been given. If proper objection

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had been made to the form of the question, no doubt the court would have required the question to be separated, and would have excluded that portion which had no bearing upon the matter in controversy. The rule is elementary and based upon sound reason, that objection made to a question is properly overruled, unless the objection is good as against the entire question. "Where part of the testimony, objected to as a whole, is admissible, it is not error to overrule the objection." *Schulze v. Jalonick*, 44 S. W. Rep. [Tex.], 580. After the witness had answered the question, plaintiff in error moved to strike such portion as was not responsive. This motion was sustained by the trial court. Plaintiff in error did not ask to have any other portion stricken out. The trial court struck out that part of the answer to which plaintiff in error directed his motion, and we are of the opinion that there was no error of the trial court in this regard of which plaintiff in error can complain. The first contention, therefore, must be decided adversely to plaintiff in error.

After plaintiff in error had rested its case, defendant in error called Dr. Andrews for further examination in chief. He then testified as follows:

Q. If you had arrived at the residence of Mrs. Church that evening at the hour of 8 o'clock or about that time, and found her suffering in confinement, and all of the child born except its head and one arm, could you in all probability have perfected the delivery within three or four minutes thereafter?

Objected to, as immaterial, and being mere conjecture, and asking the witness as to a case of probability. Overruled. Exception.

Further objection, that the plaintiff has rested its case without showing any facts disclosing to defendant the special circumstances and conditions upon which she predicates her claim for damages. Overruled. Exception.

A. There is a probability in it, and I was answering along that line——

(Question read and further answer): Yes, sir

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That the question called for a mere conjecture and asked the witness as to a case of probability is the only one of these three objections relied on by counsel or mentioned in brief. It can not be said that the question was objectionable for the reason stated. The witness was qualified as an expert. There was sufficient evidence already in the record to authorize the assumed state of facts contained in the question. The answer called for was whether the witness, as a competent physician, in the case stated, could, in all probability, have effected a delivery within a given time. A greater degree of certainty can not reasonably be required in the testimony of medical experts. The science of medicine and surgery has not reached that degree of excellence when its votaries can say to a mathematical certainty what in a given case would be the results of a given remedy.

In the case of *Peterson v. Chicago, M. & St. P. R. Co.*, 39 N. W. Rep. [Minn.], 486, the court says, with reference to the following question asked of a medical expert, "What, in your judgment, is the probability of her recovery?" "The point of the objection is that it called for an answer purely speculative in its character. While we have no disposition to extend the scope of this kind of evidence beyond the limits of established rules, yet we do not see that this question is obnoxious to the objection made. In view of the nature of the subject-matter of the inquiry, it amounted to nothing more than asking the witness his professional opinion whether she would recover. This was not an event the occurrence of which could be stated with absolute certainty. It was wholly a question of probabilities, and all that any honest witness, however skillful, could say would be that the recovery was either probable or improbable." *Hendershot v. Western Union Telegraph Co.*, 68 Am. St. Rep. [Ia.], 313; *Block v. Milwaukee Street R. Co.*, 27 L. R. A. [Wis.], 365.

But in brief counsel suggests that the question called, not for testimony to be considered by the jury, but a conclusion or decision to be accepted by them, and that it

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called for a conjecture or a guess as to what he, the witness, could in all probability have done in the case which was the subject of the controversy. It is doubtful whether the question can be said to be vulnerable to this objection. But this objection directed to the form of an hypothetical question should have been made at the trial, so that the trial court could have passed thereon with this criticism in mind. Manifestly, this was not done. The objection was that the question "was mere conjecture, and asking the witness as to a case of probability." As we have already seen, this is no valid objection to the testimony of a medical expert. We think from the question as put, and the answer of the witness, the jury must have understood this testimony as being nothing more than the opinion of the doctor, as a professional man, familiar with matters of this kind by reason of his habit and experience, as to the probabilities of an immediate delivery if he as a physician, arriving at the hour stated, had found the conditions assumed to exist in the question.

In the case of *Potter v. Detroit, G. H. & M. R. Co.*, 81 N. W. Rep. [Mich.], 80, it is said: "An objection that by the terms of a hypothetical question put to a medical expert the witness was at liberty to consider the subjective symptoms in giving his answer, made for the first time on appeal, will not be considered."

In the case of *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb., 239, it is said: "It is a general rule, to which the record in this case presents no exception, that objections not urged in the trial court, will not be considered here."

In the case of *Asbestos Pulp Co. v. Gardner*, 57 N. Y. Supp., 353, it is said: "It is a well settled rule of evidence that a person objecting to the reception of testimony must state the grounds of his objection, so that the judge can rule with the criticism in his mind. Unless this is done, objections founded upon the admitted testimony are unavailing, unless they are of such a character that they could not have been obviated upon the trial."

In the case of *Puth v. Zimbleman*, 68 N. W. Rep. [Ia.],

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895, it is said: "Unless a party objecting to evidence states valid reasons for its exclusion, the objection is properly overruled, though a sufficient ground for excluding it may exist." *Continental Insurance Co. v. Pratt*, 55 Pac. Rep. [Kan.], 671.

We do not think that there was any error in the admission of this testimony of which plaintiff in error is in a position to complain, and the second contention of plaintiff in error can, therefore, not be sustained.

It is next contended that the court erred in permitting the jury to find more than nominal damages, for the reason that the substantial damages claimed and awarded are not such as would usually and ordinarily arise out of the breach of the contract to deliver the message in question, but are too remote to have been in the contemplation of the parties, or to be reasonable. It is contended that under the evidence, it was the duty of the court to have instructed the jury, as requested, that only nominal damages could be recovered. The contention is that the telegram itself, and all that was said to the agents of the company, were insufficient to apprise plaintiff in error of the injury sued for, or that was likely to arise from a failure promptly to deliver the message. We are unable to accept this view. It seems clear that the telegram itself, addressed to a physician, one known to be such by the agent of plaintiff in error at Fairbury, was sufficient to apprise it of the necessity of prompt delivery. It can not be supposed that a message of the character of that in controversy should specifically set out the actual conditions calling for a physician's presence, the person who was sick, or the nature of the disease, and it is not necessary that this should be done in order to apprise the company of the need promptly to deliver the message. The telegram, however, did direct the physician to come at once. By no possibility could the physician come at once if the message was not delivered until some hours after its receipt. *Western Union Telegraph Co. v. Sheffield*, 71 Tex., 570.

In *Postal Telegraph Co. v. Lathrope*, 131 Ill., 575, it is

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said: "It certainly can not be contended that the agent must be informed of all the facts and circumstances pertaining to a transaction referred to in a telegram, which are known by the parties themselves, to make his company liable for more than nominal damages. If it should be so held, the telegraph would cease to be of practical utility to the commercial world."

In the case of *Western Union Telegraph Co. v. Adams*, 75 Tex., 531, it is said: "It is well known to the public, and can not be unknown to telegraph companies, that the utmost brevity of expression is cultivated in correspondence by telegraph, and that that mode of communication is chiefly resorted to in matters of importance, financially and socially, requiring great dispatch."

One Green was called as a witness for defendant in error, and testified that he received the message from his sister in the village of Thompson and took it across the street to the telegraph office and delivered it to the agent of the company. Answering an inquiry as to what he said, he testified that he would not be sure, but believed that he said the message should be sent in haste. Further answering, he said he would not be positive; that he could not remember. This testimony was contradicted by the Thompson agent of the company, but its truth was a question for the determination of the jury. There can be no question that the company's agent at Thompson knew from the message itself that someone was sick, and that a physician's presence was desired at once. He testified that he knew Dr. Andrews was a physician and where he lived. In answer to interrogatories, he testified as follows:

Q. Did you know what that telegram was sent for?

A. Why, I could guess.

Q. From the telegram you knew what was meant, did you?

A. I knew that his services were required; that is all I knew about it.

Q. You knew then that there must be something that required the attention of a doctor at once, didn't you?

A. Yes, sir.

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The physician testified that in prior conversations with the agent at Fairbury he had requested that messages directed to him be delivered promptly, and the agent at Fairbury had knowledge that the person to whom the message was addressed was a physician. The telegram itself, together with all the evidence, was submitted to the jury, and they no doubt concluded that the company was aware of its importance, and that injury would likely result from delay in its delivery.

Plaintiff in error contends that a recovery on account of the pain and suffering of defendant in error endured during the absence of the physician resulting from the fault of the company can not be sustained, and that such damages are too remote and did not flow directly and naturally from the negligence of the company; and that the parties did not have such possible injury in contemplation at the time the message was delivered to the company for transmission. The correct rule, as we conceive it to be, is that speculative contingent and remote damages must be excluded, but that a party guilty of a breach of the contract will be held liable for all injury flowing directly and naturally as a result of the wrong, which both parties would have contemplated if at the time the contract was entered into their attention had been called to the natural and direct consequences of a breach. The rule does not require that the parties must have contemplated the actual damages for which a recovery would have been allowed; nor does it embrace within its scope all the consequences which might be shown to have resulted from a particular omission of duty, but only those which might properly be deemed to have been within the contemplation of the parties. The rule is practical, founded on wise policy, and is consistent with equity and good sense. *Leonard v. The New York A. & B. E. M. Telegraph Co.*, 41 N. Y., 544, 567; *Pepper v. Telegraph Co.*, 87 Tenn., 554; *United States Telegraph Co. v. Wenger*, 55 Pa. St., 262.

The rule by which to determine whether damages are immediate and proximate, or remote and speculative, is

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well stated by Justice POST in the case of *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb., 448, as follows: "The question in all such cases is whether the facts shown constitute a continuous succession of events so linked together as to make a natural whole, or was there a new and independent cause intervening between the wrong and the injury. The intervening cause must be one not produced by the alleged wrongful act or omission, but independent of it, and adequate to produce the result in question. There may be, it is evident, a succession of intermediate causes, each dependent upon one preceding it and all so connected with the primary cause as to be in legal contemplation the proximate result thereof."

In the case at bar, there was no independent intervening cause adequate to produce the result. The message was sent in ample time to prevent the injury complained of; it was not delivered promptly, and the physician did not arrive at the residence of defendant in error until after his services were no longer required.

In the case of *Western Union Telegraph Co. v. Cooper*, 1 L. R. A. [Tex.], 728, which is in nearly all respects like the one at bar, it was said: "Damages in a suit against a telegraph company for failure to deliver a message to a physician, summoning him to attend a woman in confinement, can not be based upon the death of the child before birth, and the grief of the parents occasioned thereby, but a reasonable consideration should be allowed for any increased pain and mental suffering caused the mother by the physician's absence."

In the case at bar there can be no doubt that the labor during confinement was prolonged on account of the failure of the physician to attend, and we are of the opinion that the defendant in error is entitled to substantial rather than nominal damages.

The last assignment of plaintiff in error is that the verdict returned is excessive, being so large as to lead to the presumption that it is the result of passion and prejudice and improper influence. It will be conceded that the ver-

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dict of a jury, in cases properly submitted, is ordinarily conclusive. In the absence of any showing that the jury were improperly influenced, the amount of the verdict must be so far beyond all reason as to raise a presumption that it is the result of passion and prejudice. The only question raised for consideration, therefore, under this assignment is whether the verdict is so excessive as to raise a presumption of passion and prejudice, calling for a reversal of the case. Counsel say that it is more than twice as large as could fairly be awarded where the verdict is limited to mere compensation. It is conceded that there is no fixed rule by which the actual damages in a case of this kind are to be measured. This being true, it would seem to follow that the jury's verdict is the best and most satisfactory means of determining the extent of the damages. We do not feel warranted in saying that the verdict is excessive. That great pain and agony ordinarily accompany childbirth even in cases where sympathetic and competent persons are in attendance to render all assistance lying within human power is a matter of common information. It may be said that this pain and agony is such that no person could negligently be the occasion of its prolongation without being culpable. We do not believe that the jury in the case at bar returned a verdict so excessive in the premises as to be presumptively the result of passion and prejudice against plaintiff in error.

After a careful examination of the record in this case, we have arrived at the conclusion that no prejudicial error occurred at the trial, and the judgment is right and should be affirmed. It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

Kershaw v. Barrett.

EMILY KERSHAW V. ALICE E. BARRETT ET AL.

FILED MAY 21, 1902. No. 11,361.

Commissioner's opinion. Department No. 1.

1. **Bills and Notes. ACTION AGAINST MARRIED WOMAN: DEFENSE OF COVERTURE.** In an action against a married woman on a note executed by her as surety for another, coverture is a complete defense, unless it be shown that such note was made with the intention on her part of binding her separate estate for its payment. *Smith v. Bond*, 56 Neb., 529, followed.
2. **Bills and Notes: MARRIED WOMAN AS SURETY: DEFENSE OF COVERTURE: EVIDENCE.** Evidence examined, and *held* to support the findings and judgment of the trial court.

ERROR from the district court for Johnson county.
Tried below before LETTON, J. *Affirmed.*

S. P. Davidson, for plaintiff in error.

E. Ross Hitchcock, contra.

DAY, C.

Emily Kershaw brought this action in the district court for Johnson county against John E. Barrett and Alice E. Barrett to recover upon two promissory notes executed by the defendants to the plaintiff. John E. Barrett made no defense. Mrs. Barrett defended the action upon the grounds that she signed the notes only as surety for her husband; that she did not, directly or indirectly, receive any portion of the consideration for which the notes were given; that they were not given with reference to her separate property or business, or with the intention of binding her separate estate. The case was tried to the court without the intervention of a jury, resulting in general findings in favor of Mrs. Barrett. To review this judgment the plaintiff brings error to this court. The only errors assigned in the motion for a new trial and the petition in error relate to the sufficiency of the evidence to support the finding and judgment of the court.

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It is admitted that Mrs. Barrett was a married woman at the time she signed the notes sued on, and the proof is undisputed that she signed them merely as surety for her husband; that she did not, directly or indirectly, receive any part of the consideration for which the notes were given, and that the transaction had no relation to her separate property or business. The transaction in question having no relation to the separate estate or business of Alice Barrett, she is not liable on the notes, unless it is established that she signed them intending thereby to make them a charge upon her individual property. *Grand Island Banking Co. v. Wright*, 53 Neb., 574; *Stenger Beneficent Association v. Stenger*, 54 Neb., 427; *State National Bank v. Smith*, 55 Neb., 54; *Smith v. Bond*, 56 Neb., 529.

It only remains to be considered whether Mrs. Barrett intended, at the time she signed the notes, to render her separate estate liable for their payment. The trial court found that she had no such intention, and this finding is supported by clear and positive testimony. The plaintiff contends that the recitals of the notes are alone sufficient to show the intention of Mrs. Barrett to bind her separate property. The notes are alike in form and each contains a recital as follows: "And to secure the payment of said amount, I hereby authorize, irrevocably, any attorney of any court of record to appear for me in such court, in term time or vacation, at any time hereafter, and confess a judgment without process in favor of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs and \$10 attorneys' fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that my said attorney may do by virtue hereof." The language above quoted amounts to nothing more than mere general engagements. There is nothing contained therein to indicate that the contract was made for the purpose and with the intention of binding her separate estate.

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It is also urged by the plaintiff that certain statements contained in a letter written by John E. Barrett to the plaintiff, in which the notes were inclosed, were sufficient to indicate an intention on the part of Mrs. Barrett to bind her separate property. The portion of the letter referred to is as follows: "I will say it will take some time for me to recover from the losses of the last three years. My wife owns some property in her own name and she owes nothing. You have treated me all right in this matter and you can rest assured you will lose nothing."

We seriously doubt whether the evidence was sufficient to show that John E. Barrett was the agent of his wife, to make any statement binding upon her; but granting that it was, there is nothing in the letter, in our opinion, tending to establish even in a remote degree that the contract was made by Mrs. Barrett, intending thereby to bind her individual property. From an examination of the record, we are clearly of the opinion that the judgment of the court is supported by the evidence. We therefore recommend that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

BATTLE CREEK VALLEY BANK OF BATTLE CREEK, NEBRASKA, APPELLANT, V. A. COLLINS ET AL., APPELLEES.

FILED MAY 21, 1902. No. 11,419.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: CONFLICTING EVIDENCE.** Where evidence is conflicting, the finding of a fact based thereon by a court of equity will not be set aside, unless clearly wrong. Evidence examined, and held sufficient to sustain the finding of fact by the trial court.
2. **Judgments: RES JUDICATA: EXTENT OF THE RULE.** A judgment in a former suit will be a bar in a second action between the same parties and their privies involving the same subject-matters, as to everything which the record shows was within the scope of the issues litigated in the former action.

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APPEAL from the district court for Antelope county.
Tried below before ALLEN, J. *Affirmed.*

Powers & Hays, for appellant.

Willis E. Reed and *N. D. Jackson*, *contra.*

BARNES, C.

On the 2d day of March, 1899, the appellant filed its petition, in equity, in the district court for Antelope county to foreclose a chattel mortgage given by Aaron Collins to secure the payment of three certain promissory notes dated May 7, 1895, for \$1,000 each, and one for \$566.25, all due August 27, 1895. One F. J. Hale was made a party defendant to the suit, and it was alleged in the petition that he was in possession of a portion of the property described in the chattel mortgage; that he claimed to be the owner of it, and refused to deliver the same to the plaintiff. It was also alleged that whatever interest defendant, Hale, had in the property was subject to the plaintiff's mortgage lien.

The defendant, for answer to the petition, admitted the execution and delivery of the notes and chattel mortgage described therein, and the filing thereof; that a portion of the property described in the mortgage had been sold to the defendant, Hale, who owned the same, and refused to deliver it to the plaintiff. And further answering, the defendants denied each and all of the other allegations contained in the petition. It was also alleged in the answer that on the 18th day of October, 1895, defendant, Collins, executed and delivered to the plaintiff one promissory note for \$695.55, which was accepted and received by the plaintiff in satisfaction and payment of the note for \$566.25, secured by the chattel mortgage, and in satisfaction of that portion of the mortgage lien. It is further alleged that on the 7th day of May, 1896, the defendant, Collins, executed and delivered to the plaintiff one promissory note for \$3,000, due October 7, 1896, and at the

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same time for the purpose of securing the payment thereof he executed and delivered to plaintiff a chattel mortgage on a large amount of personal property, including all of the property described in the chattel mortgage in this suit; that said promissory note for \$3,000, and the mortgage securing the same, were received and accepted by the plaintiff in full payment and satisfaction of the three one thousand dollar notes mentioned in the plaintiff's petition, and of the lien created by the mortgage described therein; that on February 9, 1898, the plaintiff took possession of all of the personal property described in the mortgage set forth in its petition, together with all of the other property covered by the chattel mortgage executed May 7, 1896, and continued in possession thereof until February 17, 1898, when defendant, Collins, replevied the same from the plaintiff; that on the trial of said cause plaintiff herein claimed the right to the possession of the property under and by virtue of the chattel mortgage of May 7, 1896; and that the jury returned a verdict in said cause for the plaintiff herein; that by said verdict the value of the plaintiff's right of possession in and to the property in controversy was fixed and determined; that the court rendered the proper judgment upon the verdict; that the said judgment remains in full force and effect, and has never been in any manner reversed or modified; that the defendant herein paid into court the amount of the said judgment, and that thereby the lien of the plaintiff's mortgage in question in this suit was extinguished, and the plaintiff is forever estopped from claiming any right, title or interest in or to the property in controversy herein. To this answer the plaintiff filed a general denial. This put in issue, first, the question as to whether or not the note of \$695.55 and the note of \$3,000, dated May 7, 1896, and the chattel mortgage given on the same date, were taken in payment and satisfaction of the notes and mortgage described in plaintiff's petition, and of the lien created thereby; and, second, the question as to whether or not the former action and judgment pleaded as a bar to any further proceedings

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to subject the mortgaged property to the payment of another portion of the same debt constituted a defense to this action. On these issues and the evidence the court found generally for the defendants and rendered a judgment in their favor. From this judgment the plaintiff appeals to this court.

1. The first question is purely one of fact, and if the evidence is sufficient to sustain the finding of the court on this point such finding will not be disturbed and will uphold the judgment of the trial court. It is conceded on all sides that on May 17, 1895, defendant, Collins, executed and delivered to the plaintiff three notes for \$1,000 each, and one note for \$566.25, and the chattel mortgage on which this action is predicated, to secure their payment. It must be further conceded that on the 7th day of May, 1896, the defendant, Collins, made, executed and delivered to the plaintiff one promissory note for \$3,000 and secured the payment of it by a chattel mortgage of that date, which contained all of the property described in the mortgage of May 17, 1895, still alive and in his possession, and in addition thereto all of the rest of his personal property, goods and chattels, except his household furniture. It is shown by the evidence that at the same time Collins executed and delivered to plaintiff another note for the sum of \$2,000, which was not secured by the mortgage given at that time. It is also shown that this \$2,000 note included the note of October 18, 1895, for \$595.55, which was a renewal of the note for \$566.25 of May 17, 1895, together with other items of indebtedness from defendant, Collins, to plaintiff not secured by the mortgage of May 17, 1895; and that the notes, one for \$3,000 and the other for \$2,000, included and covered all of the indebtedness due in any manner or on any account from defendant, Collins, to the plaintiff.

We now come to the point in dispute, which is, whether or not this renewal was understood to be, and was made, as a satisfaction and release of the notes and mortgage in question in this suit; and whether or not the mortgage in

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question in this suit stands as security for the payment of the \$2,000 note, or any part of it. On this point both Collins and his wife, who were all the persons present at the time of the renewal, except S. K. Warrick, then cashier of the plaintiff, state positively that all of the old notes and the mortgage (the papers, as the wife expressed it) were to be returned to them by Warrick, and that he, Warrick, promised to surrender and return them. This statement Warrick denies.

It is contended by appellant that this evidence is not sufficient to show a release of the mortgage in suit, and standing alone we are not prepared to say that it would be sufficient to sustain a finding to that effect. But a further examination of the evidence discloses that Collins testified that the \$2,000 note was secured by the assignment of a certain school land lease to the bank in which he, Collins, had an interest, which it was agreed was worth \$2,700; and further that the plaintiff would not renew and extend the time of payment of the indebtedness evidenced by this \$2,000 note unless he, Collins, would give plaintiff the school-land lease as security for the payment of it. This evidence is not denied by the plaintiff; in fact Warrick in his evidence in this case admits this to be true, but says that he had it in his mind to still hold the old mortgage as security for the \$2,000 note in addition to the school land security. It is clear that Collins never knowingly agreed or consented to this; and it is a matter of grave doubt if the mortgage in suit ever was in any way security for the \$2,000 note or the debt evidenced by it. In addition to this, the evidence of Warrick given upon the trial of the replevin suit, pleaded as a bar herein, was introduced, and therein we find the following:

Q. I wish you would explain to the jury about this \$800 credit that you say the plaintiff is entitled to on the school land? How much was the bank to give Collins for this school land?

A. Was to give him \$2,700.

Q. How much was back on the contract?

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A. One thousand three hundred and sixty-eight dollars due the state yet.

Q. Did you have a written agreement with the plaintiff?

A. Yes, sir.

Q. About this school land?

A. You ask me how much there was back to the state; there was \$1,368 back, and a lot of back lease and expenses of appraisement, \$451.01. I have a list of it.

Q. That was what you paid, \$451.01 to the county treasurer?

A. Yes, sir.

Q. What else did you pay?

A. There was interest on that till October 14, \$13.14, and this payment we had made; we paid this quite a time before this purchase was made; I paid and carried it down here before we purchased the land. If you remember, there was a law passed that after a certain date there couldn't be any land bought in, and we paid up on it the back lease and a one-tenth payment on the purchase price and expenses of appraising the land.

Q. What was still back?

A. Interest, \$13.13, figured at 10 per cent.; that was agreed to at the time we figured it by Mr. Collins. That was credited on the note, \$868.68.

Q. How much is still due the state?

A. One thousand three hundred and sixty-eight dollars.

Q. Why did you credit the \$868.68 on the \$2,000 note?

A. Because the \$2,000 note was secured by the lease of the school land. It was up as security for this \$2,000 note and there should have been a larger amount for it, but it was appraised pretty high, some as high as \$12 an acre, and that's the reason that there was such a large deficiency.

Q. By what sort of an agreement did you hold this school-land lease?

A. It was written out and signed over.

Q. Didn't you have some kind of a contract?

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A. It was assigned absolutely, just the same as if it had been purchased. There was never an agreement except a verbal agreement.

Q. Where was that verbal agreement made?

A. It was talked of a number of times, and Mr. Collins urged me very strongly to buy the land in when the law was changed, to buy it in and protect him on it; he didn't want to lose what he had put in it.

Q. When was the agreement made?

A. It was made back quite a while ago; the lease is on file with the state.

Q. How many years ago?

A. It was quite early; I think it must have been in 1892 or 1893.

Q. The agreement was made for the purpose of securing this \$2,000 note?

A. It was repledged; never no agreement made at the time the note was renewed; at the time it was renewed it was pledged as security for the \$2,000 note, and the chattel for the \$3,000 note.

Q. And where did that occur?

A. These notes were made up at Mr. Collins' house.

Q. What was it originally assigned to you for?

A. Originally, I couldn't state, the exact note, Mr. Jackson. It has been quite a while, and it would be hard for me to tell the exact note.

Q. Who was present at the time it was agreed by Mr. Collins that you should hold it for the \$2,000 note?

A. I don't think there was anybody there but Mr. Collins and myself. I don't think there was anybody out there with me.

Q. What was said about it?

A. It was spoken of in a general way. I told him I would take a chattel to secure that note, and the school contract would stand as security for the \$2,000 note, and he agreed to it.

Q. You had that conversation out there at his house at the time the \$2,000 and \$3,000 notes were given?

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A. Yes, sir.

Q. Did you have the school contract with you?

A. Yes, sir, it was down in our bank.

Q. Is it not a fact that it was not spoken of at that time?

A. It was spoken of. I wouldn't take that \$2,000 note without security.

Q. Had you ever had any security for it before?

A. The lease had been up for other notes that were merged in this one.

Warrick also testified in this suit that plaintiff based its claim herein on a balance due on the \$2,000 note as he understood it.

The question upon this evidence is, not what we would have found thereon; but is it sufficient to sustain the findings of the learned trial court? We are constrained to hold that the finding, that the mortgage in suit had been released, at least as to that portion of the debt evidenced by the \$2,000 note, is amply sustained by the evidence on that point.

2. We will now consider the effect of the suit and the judgment therein, which is pleaded in bar to the plaintiff's right to recover in this action. It appears from the evidence, including the proceedings and judgment in the suit above mentioned, that in February, 1898, Warrick, as agent for the plaintiff, went to the premises of the defendant, Collins, and took possession of all of the personal property described in the mortgage of May 7, 1896, which was still in existence, and also all that was left of the property described in the mortgage of May 17, 1895; in fact he took possession of practically all of the property found in the possession of Collins, of every kind and nature, except his household goods, such possession being taken under and by virtue of the mortgage of 1896. The defendant, Collins, afterwards instituted a suit in replevin against the plaintiff, which is the suit pleaded in bar, and on the trial thereof plaintiff herein, who was the defendant in that case, set up its right to the possession of the property under and by virtue of the chattel mort-

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gage given May 7, 1896, in renewal of the one of May 17, 1895. Plaintiff thereby waived any right it may have had to claim the property by virtue of the mortgage in question in this suit. It was incumbent upon the plaintiff in that suit to exhibit all of its claims of right to the possession of the property in controversy, and failing to do so it can not now assert them as against one who has purchased the property which was released from the mortgage lien by the payment of the judgment in that action which found and determined the value of plaintiff's right to the possession of the property in controversy. On the trial in this case Warrick, plaintiff's cashier, testified that as he understood the matter plaintiff had no claim on the property, except for the balance due upon the \$2,000 note.

In the action pleaded in bar herein the plaintiff in this case was the defendant, and the defendant, Collins, was the plaintiff. The defendant, Hale, in this suit, purchased the property of defendant, Collins, and claims it through privity with him. It will thus be seen that the parties to that suit and to the one at bar are the same, or at least the same parties and their privies. The matter in controversy in that suit was the right to the possession of the property sought to be reached and held as security for the payment of a portion of the same debt in controversy in that case, and also in this one. "Whenever a matter is adjudicated and finally determined by a competent tribunal, it is considered forever at rest. This is a principle upon which the repose of society materially depends, and it therefore prevails, with but very few exceptions, throughout the civilized world. This principle not only embraces what actually was determined, but also extends to every other matter which, under the issues, the parties might have litigated in the case." Therefore, everything within the knowledge of the parties which might have been set up as a ground of relief or defense will be presumed to have been litigated in that action. This rule is a general one, and is sustained by an un-

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broken line of authorities. 1 Herman, Estoppel and Res Judicata, pages 133, 134; *Thompson v. Myrick*, 24 Minn., 4; *Mally v. Mally*, 52 Ia., 654; *Kelley v. Donlin*, 70 Ill., 378. This proposition is so well settled that it is unnecessary to cite any further authorities in support of it. We therefore hold that the evidence on this point was sufficient to sustain the finding of the district court; that the former suit and judgment was a bar to the further prosecution of this action, and the plaintiff is estopped from claiming any further right, title or interest in and to the property in controversy.

As we have heretofore said, the court was justified in finding that the mortgage in suit, as a matter of fact, had been released as to the indebtedness evidenced by the \$2,000 note, and that the security therefor had been transferred to the school-land lease. Indeed, it is very doubtful if the mortgage sought to be foreclosed ever was security for the \$2,000 note, or any part of the debt evidenced by it.

These facts, taken together with the former suit and judgment pleaded in bar to plaintiff's right to recover in this action, were sufficient to sustain the findings of the trial court, and we therefore hold that the judgment should be affirmed.

OLDHAM and POUND, CC., concur.

AFFIRMED.

MARY E. GANDY V. THE ESTATE OF WILLIAM C. BISSELL,
DECEASED.

FILED MAY 21, 1902. No. 11,620.

90 NW 563
Commissioner's opinion. Department No. 2.

1. Evidence: REMOTENESS OF FACT: RULE FOR DETERMINING. Whether a particular fact sought to be proved is too remote is a question that can not be determined according to any fixed and unvarying rule. The circumstances of the particular case and the relation of the fact in question to other evidence must be taken into account.

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2. **Evidence: TENDENCY TO ESTABLISH FACT IN CONTROVERSY: ADMISSIBILITY.** Evidence is not to be rejected, necessarily, because it does not bear directly upon the issue. If it forms a link in the chain of evidence or tends reasonably to establish the fact in controversy by strengthening the probabilities on one side or weakening those upon the other, it should be received.

ERROR from the district court for Richardson county.
Tried below before STULL, J. *Reversed.*

S. P. Davidson, for plaintiff in error.

F. Martin and *C. Gillespie*, *contra.*

POUND, C.

Mary E. Gandy presented a claim against the estate of William C. Bissell, deceased, based on a promissory note purporting to have been executed by said William C. Bissell, payable to the claimant or bearer. A judgment in the county court was appealed from and the claim was tried to a jury in the district court, where a verdict was found for the estate and judgment was rendered accordingly. The claimant seeks a review of said verdict and judgment by petition in error.

Of the several errors assigned, two only require attention. The instructions are free from error and the evidence offered by the estate and admitted, which forms the basis of one assignment of error, appears competent and admissible. But a very serious question arises upon certain evidence offered by the claimant and excluded by the trial court. The note sued on bears date March 26, 1892. The alleged maker was at that date a very old man, and one of the strong points against its authenticity was that he was then in no business wherein or by reason whereof he could require so large a sum of money. One witness was produced, however, whose testimony, if believed, tended to show that the note in question was executed in settlement or renewal of prior debts. Under this state of the testimony, the claimant offered a witness to prove that

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in 1884, eight years before the date of the note, the deceased owed her about \$1,000 for moneys advanced, and produced also a series of checks, payable to him, which, it was shown, had been paid through the bank and charged to the claimant's account. It was also shown that the deceased had gotten the money upon one of these checks by purchasing a draft therewith. The last of these checks is dated the day before the note. All of this evidence was excluded. The reason for such ruling seems to have been that most of the checks, as well as the evidence as to the indebtedness in 1884, were considered too remote. It will be admitted that such might be the proper view in many cases. But here the circumstances were peculiar. Mr. Bissell was a very old man at the date of the alleged note. His days of business activity were in the past. There was not the same presumption that his business affairs were promptly adjusted and kept up which would obtain in case of a younger man in active business life. There was testimony tending to show that the note in question had been given in settlement or renewal of pre-existing accounts or obligations. Hence, so long as the improbability of the case was the strong point urged by the estate, it was highly important for the claimant to show, if she could, and that by disinterested persons, for her own testimony would have been incompetent, that there was an account between the parties and a large indebtedness due her thereon prior to the date of the note. Considering Mr. Bissell's age, circumstances and mode of life, if there was such an indebtedness, it must have been of long standing; and while the testimony and exhibits offered, standing alone, would not prove the claimant's case, they clearly did tend to prove extensive transactions between the parties prior to the date of the note and a pre-existing indebtedness. If there was a large running account of long standing between the parties, and if Mr. Bissell had from time to time received considerable sums of money from Mrs. Gandy, the testimony tending to show that the note was given in settlement of some such ac-

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count is obviously explained and strengthened. All evidence logically relevant is not necessarily admissible. If so remote as to be misleading or confusing, it may be rejected. But no absolute rule can be laid down. Whether a particular fact sought to be proved is or is not too remote, is a question which can not be determined by any fixed and unvarying standard. The circumstances of the particular case and the relation of the fact in question to other evidence must be taken into account. That deceased owed the claimant \$1,000 in 1884, of itself, did not tend to prove that he owed her anything in 1892. Nor did the fact that from time to time thereafter and prior to the date of the note she gave him checks for considerable sums, create any necessary inference to that effect. But when these facts are taken together and in connection with the testimony indicating the purpose for which the note was given, the conjunction of circumstances is suggestive and bears directly on the question of probability. The estate claimed there was no reason for making the note. This evidence tended to show one. Testimony is not to be rejected, necessarily, because it may not bear directly upon the issue. If it forms a link in the chain of evidence, or tends reasonably to establish the fact in controversy by strengthening the probabilities on one side or weakening those upon the other, it should be received. *Cortelyou, Ege & Van Zandt v. Mc'arthy*, 37 Neb., 742, 746; *Passmore v. Passmore's Estate*, 50 Mich., 626, 16 N. W. Rep., 170; *Hunter v. Harris*, 131 Ill., 482, 23 N. E. Rep., 626; *Tams v. Bullitt*, 35 Pa. St., 308; *Remy v. Olds*, 34 Pac. Rep. [Cal.], 216; *Huntington v. Attrill*, 118 N. Y., 365.

It is argued that the presumption arising from the checks is only that the drawer was paying moneys which she owed. But in this case there is the note, purporting to be signed by the deceased, believed by all the witnesses who testified in relation thereto to be in his writing, the testimony of one witness indicating that the note was given in settlement or renewal of old obligations, and the prof-

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ferred evidence of a course of dealing and indebtedness beginning eight years before. The checks offered have some tendency to connect the prior indebtedness and the note in suit, and taken all together it is for a jury, and not a court, to say whether the presumption relied upon is not completely overcome.

For the errors in excluding the evidence referred to it is recommended that the judgment be reversed, and the cause remanded for a new trial.

BARNES and OLDHAM, CC., concur.

REVERSED AND REMANDED.

MELLISSA A. RAYNOR V. THE CITY OF WYMORE.

FILED MAY 21, 1902. No. 11,656.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error:** INSTRUCTION ASSUMING A STATE OF FACTS. An instruction which assumes the existence of a state of facts, which the jury has no right to find, there being no evidence in support thereof, is erroneous.
2. **Damages:** PERSONAL INJURIES: NEGLIGENCE: CONFLICTING INSTRUCTIONS. Instructions examined, and held to be conflicting and consequently erroneous and prejudicial.

ERROR from the district court for Gage county. Tried below before STULL, J. *Reversed.*

Samuel Rinaker and Robert S. Bibb, for plaintiff in error.

A. D. McCandless and J. H. Broady, contra.

DAY, C.

Melissa A. Raynor brought this action in the district court for Gage county against the city of Wymore to recover damages alleged to have been sustained by her by

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reason of a fall occasioned by the defective condition of a sidewalk in said city. The trial resulted in a verdict and judgment in favor of the defendant, to review which the plaintiff brings error to this court.

The principal errors relied upon by the plaintiff for a reversal of the judgment relate to the giving of certain instructions to the jury. As we have reached the conclusion that the judgment should be reversed for reasons hereinafter stated, we deem it unnecessary to review the testimony, except in so far as it has a direct bearing on this instruction.

One of the errors complained of by the plaintiff relates to instruction No. 8, given at the request of the defendant which is as follows: "The court instructs the jury that it is negligence for a person knowingly and unnecessarily to expose himself to danger and if you believe from the evidence that the plaintiff before and at the time of the alleged injury knew of the defect in the sidewalk by reason of which she claims to have been injured, and that in going to and from her place of business plaintiff could have gone with equal convenience by some other sidewalk or sidewalks, if the same were in a safe condition, and thus have avoided the defect above mentioned and failed to do so, then she was negligent and if you so find, then the plaintiff can not recover." This instruction is erroneous because it assumes as a matter of law that the defect in the sidewalk was of such a dangerous character that its use by the plaintiff was negligence, if she could have gone with safety and equal convenience to her place of destination by some other route.

The record shows that the sidewalk in question was constructed of planks laid across wooden supports extending lengthwise of said sidewalk to which supports the planks were fastened by nails; that the planks in several places had been permitted to become loosened and at the point where the injury occurred, one of them had become broken and about one half thereof entirely removed, thereby causing a hole in said sidewalk about nine inches

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wide, six inches deep and extending about one-half of the width of the sidewalk. The plaintiff had been over the walk a great many times and knew of its defective condition. It also appears that on the morning of the injury the sidewalk and the hole therein were covered by snow, so that a person walking thereon could not see the defect.

We do not think the mere using of the sidewalk in the condition and under the circumstances presented in this case would, as a matter of law, constitute negligence on the part of the plaintiff. Whether it was negligence for her to attempt to pass over the walk would depend upon whether she exercised ordinary care in selecting her route, and exercised ordinary care in using the sidewalk, that is, such care as an ordinary prudent person would have exercised under similar circumstances. This was a question for the jury to determine from a consideration of all of the facts and circumstances of the case.

This instruction is also erroneous because it is not responsive to the evidence. There is no testimony in the record that there was any other sidewalk or route which the plaintiff could have selected in going to and from her place of business. The instruction assumed the possible existence of a state of facts which the jury had no right to find from the evidence. This was error. *City of Crete v. Childs*, 11 Neb., 252; *Hitchcock v. Shager*, 32 Neb., 477; *Farmers Loan & Trust Co. v. Montgomery*, 30 Neb., 33; *Bowie v. Spaid*, 26 Neb., 635.

At the request of the plaintiff the court gave instruction No. 5, which is as follows: "The court instructs the jury that the fact that a person uses a sidewalk in ordinary use by the public with knowledge of the defect therein instead of taking another route to her destination does not constitute negligence." This instruction is not entirely free from criticism, because it ignores the element of ordinary care required of any person using the sidewalk, still, the plaintiff having requested it can not now complain because it was given.

A casual examination of the two instructions above

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quoted will disclose that they are irreconcilably in conflict. By the fifth instruction, the jury are told that the use of the sidewalk by plaintiff with knowledge of its defective condition, instead of some other route, was not negligence. By the second instruction the jury are told that if she knew of the defect and could have avoided it by taking another route equally convenient and did not do so, she was negligent. In our opinion, these instructions could not be otherwise than confusing to the jury because the jury was left in doubt as to which paragraph was correct. It has been held repeatedly by this court that an erroneous instruction is not cured by merely giving another on the same subject stating the rule correctly, because the jury would be left in doubt as to which paragraph was correct. *Williams v. McConaughy*, 58 Neb., 656; *Henry v. State*, 51 Neb., 149; *Carson v. Stevens*, 40 Neb., 112; *Richardson v. Halstead*, 44 Neb., 606; *Metz v. State*, 46 Neb., 547; *Crosby v. Ritchey*, 56 Neb., 336; *Wasson v. Palmer*, 13 Neb., 376; *Fitzgerald v. Meyer*, 25 Neb., 77; *Ballard v. State*, 19 Neb., 609; *School District v. Foster*, 31 Neb., 501; *First National Bank of Denver v. Lowrey*, 36 Neb., 290.

Complaint is also made of other errors, but as they are not likely to again arise on a retrial, we do not deem it necessary to consider them in this opinion. We therefore recommend that the judgment of the district court be reversed.

HASTINGS and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

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JULIAN W. ANDREW ET AL., APPELLEES, v. BERNARD WHITWER, APPELLANT.

FILED MAY 21, 1902. No. 11,690.

Commissioner's opinion. Department No. 2.

1. **Principal and Agent: PARTY ACTS AS AGENT FOR BOTH VENDOR AND PURCHASER: BONA FIDES.** When a party acts as agent for both the seller and the buyer, and that is known to them, the law exacts the most perfect good faith, honesty and fairness on his part, and will not adjudge the specific performance of a contract thus made unless it has been entered into with perfect fairness and without misapprehension or misrepresentation. *Morgan v. Hardy*, 16 Neb., at page 437, followed.
2. **Principal and Agent: AGENT REPRESENTING BOTH VENDOR AND PURCHASER: EVIDENCE.** Evidence examined, and *held* sufficient to sustain the judgment of the district court.

APPEAL from the district court for Lancaster county.
Tried below before FROST, J. *Affirmed.*

Tibbets Bros., Morey & Anderson, for appellant.

Flansburg & Williams, *contra.*

OLDHAM, C.

This was a suit brought in the district court for Lancaster county, Nebraska, by the plaintiffs, Julian W. and Roy Andrew, to enjoin the defendant, Bernard Whitwer, from filing in the office of the commissioner of public lands and buildings the assignment upon four land contracts and to prevent the defendant from trespassing upon or interfering with the plaintiffs' possession of the lands described in the sale contracts.

The facts upon which plaintiffs relied for the relief prayed are that they are in possession of the lands described in their petition by virtue of sale contracts duly executed to them by the state of Nebraska in the year 1890; that in the year 1898 the defendant, Bernard Whitwer, was the owner of twenty shares of the capital stock

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of the First National Bank of Neligh, Nebraska, of the par value of \$2,000; that in September, 1898, the plaintiffs entered into an agreement with the defendant through the mediation of C. R. Alder for the exchange of their land contracts for the bank stock owned by the defendant, Whitwer; that this agreement was procured by the representations of Alder that the bank was a solvent, going concern and the bank stock was worth its par value; that relying on these representations they executed an assignment of these land contracts and delivered them to one Jenkins, a real estate broker in Neligh, Nebraska, to be by him exchanged with Alder for defendant's \$2,000 of bank stock; that the assignment of these land contracts was delivered by Jenkins to Alder on the 11th day of October, 1898; that Alder mailed the contracts to one Dunlevy, the cashier of the Bank of Tilden, Nebraska, for delivery to Whitwer when the bank stock was sent to Alder; that while all these negotiations were pending the First National Bank of Neligh was insolvent; that on the 18th day of October one Whitmore, a national bank examiner, took charge of the bank because of its insolvent condition and was subsequently appointed receiver of said bank, and as such receiver was in charge of the assets of the bank at the time of the trial of this cause in the court below; that when Dunlevy received the land contracts with the assignment of the plaintiffs thereon on the 11th day of October, he retained them in his possession until the evening of the 18th day of October, when he placed them in the private box of the defendant, Whitwer, at his bank and mailed the certificates of stock owned by defendant, Whitwer, to Alder, cashier of the First National Bank of Neligh; that when these certificates of stock were received at Neligh the national bank examiner took them into his possession and retained possession of them, and plaintiffs, as a matter of fact, never did receive them. On the morning of October 19, Jenkins, who was looking after plaintiffs' interest in the transaction, went to Alder and demanded a return of plaintiffs' contract. On being in-

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formed that the contracts had been sent to Dunlevy at the Tilden bank he requested Alder to immediately telegraph Dunlevy for a return of the contracts. This Alder did, and received a reply from Dunlevy saying that he could not return the contracts because he had delivered them to Whitwer the evening before. Demand was subsequently made on Whitwer for a return of the contracts, but he declined to comply with the demand and attempted to have the assignment recorded in the office of the commissioner of public lands and buildings.

There is little, if any, conflict of testimony in the record. Defendant's theory of the transaction was that he acted in perfect good faith in the matter and that he believed that his stock was of its par value, and that he had no knowledge of the insolvent condition of the bank until after it had closed its doors; that his negotiations were all conducted with Alder, cashier of the First National Bank of Neligh, under a written agreement of the date of September 6, 1898, which is as follows:

"C. R. Alder hereby agrees to deliver to B. Whitwer, for his twenty shares First Nat. Bank stock, as follows:

"To deliver assignment of school land leases N. E. 4-16-23-4. Int. paid to date of delivery and \$95 cash and a cash payment this day of \$5 to bind bargain.

"B. Whitwer to deposit stock with Mr. Dunlevy, to be delivered to said Alder when he delivers above papers to him.

C. R. ALLDER.

"Neligh, Neb., Sept. 6, 1898."

That he never had any communication with plaintiffs and made no representations to them to induce an exchange of their contracts for his bank stock; that he was a farmer and lived about twelve miles from Neligh and had no knowledge or intimation that there was anything wrong with the bank at the time the alleged exchange was made. In fact the evidence shows that the defendant, Whitwer, was in Omaha attending the Trans-Mississippi Exposition at the time Dunlevy attempted to make the exchange for

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him. On issues thus joined the trial court granted the relief prayed for by the plaintiffs and defendant brings the case here by appeal.

Defendant, in his brief, earnestly contends that the judgment of the district court should be reversed because there is nothing disclosed by the testimony that affirmatively shows any bad faith on the part of the defendant in the transaction, and because the evidence adduced does not clearly impute knowledge of the actual condition of the bank to the defendant at the time the exchange of his stock for the land contracts was consummated. He also contends that Allder was in no sense his agent in effecting the trade and that any knowledge that Allder may have had of the condition of the bank should not have been imputed to him. We do not think, however, that it is necessary to enter into an ethical review of the possible motives that may have controlled the action of the defendant up to the time that the attempted transfer of the contracts for his bank stock was made by Dunlevy, who had been designated in the defendant's contract with Allder to act for him in this matter. Certain facts which are undisputed in the record, we think, control the conclusion to be reached in this controversy; these are, that the bank was actually insolvent at the time negotiations for this trade began; that negotiations were instituted by the defendant going to the cashier of the bank, who knew its condition, and seeking an exchange of his stock for lands; and the fact that after this interview between the defendant and the cashier of the bank the cashier went to the plaintiffs and represented the condition of the bank to be good and the stock to be worth par, when he knew these representations to be false, and induced the trade by these representations.

After these preliminaries the cashier of the bank entered into a contract with defendant to procure an assignment of these contracts, which agreement has been hereinbefore set out. The agreement the cashier made with the defendant for procuring the assignment of the contracts

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differed from the one he had entered into with plaintiffs in that his agreement with defendant was in writing and provided for paying the defendant \$100 bonus on the exchange of the bank stock for the land contracts, while his agreement with plaintiffs was an oral agreement for the even exchange of the land contracts for the bank stock. What could have induced the cashier of the bank to enter into this kind of a negotiation in which he would be bound to lose \$100 we are unable to say, as his testimony is not in the record, he having absconded the country when his peculations in the mismanagement of the bank at Neligh were brought to light by the investigation of the bank examiner. However, defendant knew that plaintiffs were the owners of these land contracts and he knew that Alder was attempting to get them to assign these contracts in exchange for his bank stock. This clearly and indisputably appeared from the record. These facts, under the most favorable condition in which they could be viewed from the defendant's standpoint, revealed Alder in the capacity of an agent of both the parties in making the exchange between them, and that each of the parties knew him to be acting in this capacity.

In discussing the duty owed by an agent under such conditions Chief Justice COBB, speaking for the court in *Morgan v. Hardy*, 16 Neb., at page 437, says: "When a professional land agent acts as agent for both the seller and the buyer, and that is known to them, the law exacts the most perfect good faith, honesty and fairness on his part, and will not adjudge the specific performance of a contract thus made unless it has been entered into with perfect fairness and without misapprehension or misrepresentation."

Again, the evidence shows that the contract on plaintiffs' part was merely a verbal one with Alder and was without binding effect, under the statute of frauds, until it was fully completed and until an actual delivery was made of the assignment of the contracts and the consideration for which they were assigned. *Wier v. Batdorf*, 24

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Neb., 83; *Allen v. Hall*, 64 Neb., 256, 89 N. W. Rep., 803. On this question the record discloses that the assignment of the land contracts was sent by plaintiffs to one Jenkins to be delivered by him to Allder in exchange for the bank stock. Jenkins testifies that acting under this instruction he took the contracts to Allder's bank and told Allder not to deliver them until the bank stock was assigned by the defendant. Allder, however, without any authority from plaintiffs, sent the contracts to the bank at Tilden in compliance with his agreement with the defendant. When these contracts were received by Dunlevy he did not make the exchange at once, for the reason, as he says, that the remittance from Allder "was not in strict accordance with the terms of the agreement which they had made." And as Whitwer was not present he waited until the 18th to get his authority before consummating the deal. But on the 18th, Whitwer still being absent, Dunlevy, according to his testimony, went to Whitwer's oldest son and advised him to have the exchange made in the condition in which the remittance stood, and Dunlevy then put the contracts in defendant's private box in the Tilden bank and put the assignments of the bank stock in an envelope and told his assistant cashier to direct them to Allder at Neligh. These assignments of the bank stock were not received at Neligh until the 20th, and then, as before stated, were taken charge of by the receiver of the bank. Whitwer, according to the testimony, did not return to Tilden until a day or two after the Neligh bank had closed and until after the pretended exchange had been actually consummated by Dunlevy. We think that under this testimony the evidence fails to show that the verbal agreement for the exchange of these land contracts was ever fully completed by a mutual delivery of the contracts and the bank stock.

It therefore appears that the evidence fully justifies the judgment of the trial court, and we recommend that its judgment be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED,

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WILLIAM G. URE, APPELLEE, V. CONRAD BUNN ET AL., APPELLANTS, IMPEADED WITH UNION LIFE INSURANCE COMPANY, APPELLEE, ET AL.

FILED MAY 21, 1902. No. 11,734.

90 NW 904
Commissioner's opinion. Department No. 2.

1. **Mortgage Foreclosure: FAILURE TO PLEAD "NO PROCEEDINGS AT LAW": NO OBJECTION AT TRIAL.** Whether a defendant in a suit to foreclose a mortgage, who has not raised the point in any way in the trial court, should be heard to complain on appeal that the petition lacks the required averment that no proceedings have been had at law, where the plaintiff was permitted to introduce evidence tending to show such fact without objection and the cause was tried upon the theory that it was in issue, *quere*.
2. **Mortgage Foreclosure: PLEADING: AMENDMENT IN THIS COURT.** In such case the appellee will be permitted to amend to conform to the proofs after submission of the cause in this court, and upon amendment the decree will be affirmed.
3. **Mortgage Foreclosure: "NO PROCEEDINGS AT LAW": PRIMA FACIE PROOF.** A *prima facie* showing that no proceedings have been had at law is sufficient to sustain a decree of foreclosure, in the absence of any evidence to the contrary.
4. **Taxation: FORECLOSURE OF LIEN: FAILURE TO PAY TAXES AND COSTS ON DAY OF SALE.** A tax sale is not rendered invalid by failure of the purchaser to pay the taxes and costs to the treasurer on the day of the sale when the delay is due to inability of the treasurer, with the clerical force at his disposal, to comply with the requirements of the law on that day, and the money is paid as soon as in due course of the business of his office he can receive it and properly receipt for it.

APPEAL from the district court for Douglas county.
Tried below before JESSEN, J. *Affirmed upon amendment.*

Charles Ogden and J. W. West, for appellants.

H. W. Pennock, contra.

POUND, C.

This is an appeal from a decree foreclosing certain tax liens at suit of the plaintiff and a mortgage at suit of a defendant and cross-petitioner. Three objections are

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urged, namely, that the cross-petition for foreclosure of the mortgage lacks the required averment that no proceedings have been had at law; that the evidence adduced at the hearing to show that no such proceedings had been taken is insufficient to sustain the decree; and that the tax sale is invalid, because it appears that the taxes and costs were not paid to the treasurer until some ten days after the sale.

The appellants made no point with respect to the defect in the petition at any stage of the proceedings in the district court. On the contrary they permitted the cross-petitioner to introduce evidence tending to show that there had been no proceedings at law without objection, and the cause was tried on the theory that such fact was in issue. We have some doubt whether advantage can be taken of the defect, at this time, under such circumstances. *Pokrok Zapadu Publishing Co. v. Zizkorsky*, 42 Neb., 64, 76; *Whitney v. Preston*, 29 Neb., 243; *Western Horse & Cattle Insurance Co. v. Timm*, 23 Neb., 526. In the cases cited no reply had been filed, but allegations of new matter in the answer were treated by all parties as denied. In *Bailey, Wood & Co. v. Landingham*, 52 Ia., 415, 3 N. W. Rep., 460, the same rule was applied where there was no answer to the petition. In *Lounsbury v. Purdy*, 18 N. Y., 515, 520, it was held that if the proof supplied facts which the petition omitted to state, it was "competent for the court to amend the pleading." Where the required evidence is introduced without objection, the pleading may be amended even in the appellate court to conform to the proof, *Humphries v. Spafford*, 14 Neb., at page 490. But it would seem that we need not ourselves make an amendment which the parties have not sought to make because the principle on which the authorities first cited proceed ought to have equal application to a petition. When the parties try an issue without objection as if it were duly raised by the pleadings, no one is prejudiced by the fact that it is not set forth therein. In such case the error is merely formal, and is no ground for reversal

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of a judgment in view of section 145, Code of Civil Procedure. *Miller v. Spaulding*, 41 Wis., 221; *Vassau v. Thompson*, 46 Wis., 345, 1 N. W. Rep., 4. In *Miller v. Spaulding* a pleading setting up an injury done by a domestic animal was defective for want of the allegation of *scienter*. Nevertheless the question of knowledge as to the disposition of the animal was tried without objection. The court held that the defect had become one of form only. However this may be, under section 144, Code of Civil Procedure, amendments in furtherance of justice to conform to the proof are proper at any time, before or after judgment. There is no reason why appellee should not be allowed to amend the cross-petition after the cause has been submitted in this court; and upon such amendment the decree should be affirmed. *Homan v. Steele, Johnson & Co.*, 18 Neb., 652; *Humphries v. Spafford*, *supra*; *Scott v. Spencer*, 44 Neb., 93.

The evidence adduced by the cross-petitioner makes a *prima facie* showing that no proceedings had been had at law. This is sufficient to sustain the decree in the absence of any evidence to the contrary. *President and Directors of the Insurance Co. of North America v. Parker*, 64 Neb., 411, 89 N. W. Rep., 1040.

As to the validity of the tax sale, the evidence shows that the treasurer, with the clerical force at his disposal and because of the large number of sales to be made, could do no more on the day of sale than make a memorandum of the name of the purchaser. As soon as he was able to comply with the requirements of the statute in due course of the business of his office, he notified the purchaser and the money was paid. When the delay in paying the taxes and costs is due to inability of the treasurer to comply with the requirements of the law on the day of sale, and the money is paid as soon as the treasurer is able to receive and properly receipt for it, the statute is sufficiently complied with and the sale is valid. *Leavitt v. Mercer Co.*, 64 Neb., 31, 89 N. W. Rep., 426.

We recommend that upon amendment of the cross-peti-

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tion to conform to the proofs, within ten days from the filing of this opinion, the decree be affirmed.

BARNES and OLDHAM, CC., concur.

It is ordered that in case the cross-petition be amended to conform to the proofs, within ten days from the filing of this opinion, for which leave is hereby given, the decree of the district court will be affirmed.

AFFIRMED UPON AMENDMENT.

NOTE.—June 4, 1902, the court made the following order in the above case: "It appearing to the court upon a showing by the appellants that the cross-petition herein has not been amended to conform to the proofs, within ten days from the filing of the opinion herein, for which leave was given May 21, 1902, at which time said opinion was filed, it is now ordered by the court that the judgment of the district court herein be, and the same hereby is, reversed; that the appellants recover of the appellees their costs herein, taxed at \$—; and that a mandate issue accordingly."—REPORTER.

FRANK J. SHARP V. DELMAR W. CALL ET AL.

FILED MAY 21, 1902. No. 11,750.

Commissioner's opinion. Department No. 2.

90 NW 765
Appeal and Error: ASSIGNMENT OF ERROR IN OVERRULING MOTION FOR NEW TRIAL. *Gandy v. Cummins*, 64 Neb., 312, 89 N. W. Rep., 777, followed in a case of the same nature.

ERROR from the district court for Hamilton county.
Tried below before SORNBORGER, J. *Affirmed.*

Hainer & Smith, for plaintiff in error.

D. A. Scoville and John M. Ragan, contra.

POUND, C.

This is a suit in equity brought here on petition in error. There was a motion for a new trial in the court below, which was overruled. The errors assigned in this

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court are in substance the same as those set up in the motion for a new trial, but the ruling of the district court on that motion is not assigned as error. Under the settled practice of this court, we can not review them. *James v. Higginbotham*, 60 Neb., 203; *Gandy v. Cummins*, 64 Neb., 312, 89 N. W. Rep., 777.

We recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

NOTE.—A rehearing was granted in this case, the defect in the petition in error, upon which the above opinion is based, was corrected, and the case heard on the merits. May 20, 1903, an opinion written by HASTINGS, C., was filed affirming the judgment below. This opinion is reported in 95 N. W. Rep., 16. October 7, 1903, a second rehearing was denied in an opinion by SEDGWICK, J., although this opinion is one dissenting from the former judgments. The opinion is reported in 96 N. W. Rep., 1004.—REPORTER.

MICHAEL FOSTER ET AL. V. THE MCKINLEY-LANNING LOAN
& TRUST COMPANY.

FILED MAY 21, 1902. No. 11,765.

Commissioner's opinion. Department No. 2.

1. **Mortgage Foreclosure: OBJECTIONS TO APPRAISAL: TIME OF MAKING.** Objections to the appraisement of real estate at a judicial sale are waived unless filed before sale.
2. **Mortgage Foreclosure: PROOF OF PUBLICATION: AFFIDAVIT: PRIMA FACIE PROOF.** Where the affidavit to a proof of publication alleges that the newspaper in which the publication was made is a legal newspaper, such affidavit is *prima facie* evidence of that fact.
3. **Mortgage Foreclosure: APPRAISAL AND CERTIFICATES OF LIENS: TIME OF FILING: PRESUMPTIONS.** Where the appraisement and certificates of liens are filed on the same day the notice of sale is first published it will be conclusively presumed, in the absence of a showing to the contrary, that they were filed before the notice of sale was published.

ERROR from the district court for Greeley county. Tried below before MUNN, J. *Affirmed.*

Foster v. McKinley-Lanning Loan & Trust Co.

T. J. Doyle, for plaintiffs in error.

Tibbets Bros. & Morey, contra.

OLDHAM, C.

This is a proceeding in error to reverse the judgment of the district court for Greeley county confirming a sale in a foreclosure proceeding. There is no bill of exceptions, hence the record stands unimpeached. Objection is urged against the appraisement of the property, but the record shows that the objection was not filed in the court below until after sale, and consequently it comes too late to be taken advantage of. Objection is made to the sufficiency of the proof of publication of the notice of sale because the proof fails to show that the paper in which the notice was published has a *bona fide* circulation of 200 copies weekly and had been published in the county for fifty-two consecutive weeks prior to the publication of the notice. The affidavit attached to the proof of publication states that the paper is a legal weekly newspaper, etc., and this affidavit, by section 2 of chapter 49, Laws of 1895, is made *prima facie* evidence of that fact, consequently there is no merit in this objection.

The next objection is that the notice of sale was published on the same day that the appraisement and certificates of liens were filed, and it is urged that we should presume from this fact that the publication of the notice of sale was made before the appraisement and certificates of liens were filed; but, as we view it, all reasonable presumptions should be indulged to sustain the regularity of the proceedings in the lower court, and where the appraisement and certificates of liens are filed on the same day that the notice of publication is first made, it will be presumed that they were filed prior to the publication of the notice of sale.

Finding no error in the record, we recommend that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

Dobry v. Northern Milling Co.

JOHN DOBRY ET AL. V. NORTHERN MILLING COMPANY.

FILED MAY 21, 1902. No. 11,789.

Commissioner's opinion. Department No. 2.

Justices of the Peace: APPEAL AND ERROR: DISMISSAL OF APPEAL.

A party appealing from a judgment of a justice of the peace to the district court may dismiss his appeal, without the consent of the appellee, at any time before the cause is submitted to the court, or jury. *Eden Musee Company v. Yohe*, 37 Neb., 452, approved and followed.

ERROR from the district court for Howard county.
Tried below before THOMPSON, J. *Reversed with directions.*

Henry Nunn, for plaintiffs in error.

T. T. Bell, *contra*.

BARNES, C.

The Northern Milling Company commenced an action in the justice court of Howard county against John Dobry and Antonia K. Dobry to recover a balance of \$33.15, alleged to be due to it on account for milling products sold and delivered to them. The account set out in the bill of particulars commenced with an item dated September 12, 1898, for fifteen cents, a balance at that date. The milling company had a judgment for \$27.95, and from that judgment the Dobrys appealed to the district court. After they had perfected their appeal the milling company filed its petition, and the exhibit attached thereto contained a statement of the whole account between the parties from the commencement of their dealings, but this in no manner changed the amount claimed to be due, to wit, the sum of \$33.15. Instead of filing an answer to this petition the appellants filed a motion to strike out the first eight items mentioned in the exhibit, or account, on the ground that such items presented a different issue from that tried in the justice court. The appellee moved

Dobry v. Northern Milling Co.

to strike this motion from the files, because it was filed out of time, and the motion was sustained. The appellants being in default for answer, the court entered such default, but afterwards set it aside and allowed them to answer upon the payment of the costs of the district court to that time. Thereupon appellants moved the court for leave to dismiss their appeal, which motion was overruled, and the right to dismiss their appeal was denied them. They paid the required costs, filed their answer, and the cause was tried to a jury. The milling company had a verdict for \$33.15. A motion for a new trial was overruled, judgment was entered upon the verdict, and the defendants brought the case to this court by petition in error. They will hereafter be called the plaintiffs, and the milling company will be called the defendants.

The plaintiffs assign several grounds of error in their petition, and seven of these grounds are argued in their brief. An examination of the record convinces us that the only error contained in it is the one mentioned in the third assignment of the plaintiffs' motion for a new trial, which is, the court erred "in overruling the motion and request of the defendants to dismiss their appeal in this case." We are satisfied that this assignment of error is well taken. In the case of *Eden Musee Company v. Yohe*, 37 Neb., 452, this court held that a party appealing from a judgment of a justice of the peace to the district court may dismiss his appeal, without the consent of the appellee, at any time before the cause is submitted to the court or jury. In the case at bar, after the court had set aside the default and had permitted the plaintiffs herein to file their answer, upon condition of the payment of the costs which had accrued since the appeal was taken, the plaintiffs elected to dismiss their appeal; they were evidently actuated in this determination by the fact that the court imposed the condition of the payment of costs upon them. It matters not what their motive was, they had a right to dismiss their appeal at that time, because the case had not been submitted, either to the court or

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to a jury. Had this appeal been dismissed, the rights of the defendant herein would not have been prejudiced thereby; it would have left the judgment which the defendant had recovered in the justice court in the same condition as though no appeal had been taken, and it could have enforced the collection of this judgment against the plaintiffs herein, because the bond which they had filed to perfect their appeal secured the payment of such judgment. The milling company was in a better position than it would have been had the appeal not been taken. The court therefore erred in refusing to permit the plaintiffs herein to dismiss their said appeal, and for such error the judgment herein must be reversed.

We therefore recommend that the judgment of the district court be reversed; that this cause be remanded to said court, with directions to dismiss the appeal.

OLDHAM and POUND, CC., concur.

The judgment of the district court is reversed, and this cause remanded with directions to said court to dismiss the appeal.

REVERSED WITH DIRECTIONS.

JOHN N. FRENZER V. CHARLES R. LEE.

FILED MAY 21, 1902. No. 11,818.

Commissioner's opinion. Department No. 1.

Broker: LISTING REAL ESTATE FOR SALE AS A WHOLE: SALE BY OWNER OF PART: COMMISSION. Where it appears that a piece of property has been listed with a real estate broker as a whole, and his sole authority is to negotiate a sale as a whole, and his negotiations to so sell it to a particular customer have been broken off, a subsequent sale some months later of a portion, only, of the property by the owner to the purchaser with whom the broker's negotiations were had, but independently, will not entitle the broker to a commission.

ERROR from the district court for Douglas county.
Tried below before POWELL, J. *Affirmed.*

Frenzer v. Lee.

Will H. Thompson, for plaintiff in error.

Montgomery & Hall, contra.

HASTINGS, C.

This is a suit brought to recover a real estate dealer's commission. Plaintiff's claim is that the evidence shows, beyond dispute, his right to recover, and that the court's finding and the judgment based upon it, in favor of the defendant, is not supported by the evidence and can not be sustained. A large portion of plaintiff's brief is occupied with a discussion of the constitutionality of section 74, chapter 73, Compiled Statutes of Nebraska. He claims that the decision of the trial court was based upon the belief that the statute in question is valid, and that its requirement of a written contract had not been fulfilled in this instance, but he claims that however that may be, his evidence is sufficient. It is also claimed that the answer of the defendant admits the contract, and is a waiver of any statutory requirement that it should be in writing.

In the spring of 1897 some negotiations took place between the parties with regard to plaintiff's selling for defendant some property in Omaha. May 4, defendant wrote plaintiff the following letter:

“OMAHA, NEB., MAY 4, 1897.

“*John N. Frenzer, Esq., City.*

“DEAR SIR: It occurred to me after you left this a. m., from a remark you made, that probably you would expect a commission in case you made a sale of the property. As I had not taken that into consideration in the figure I mentioned, I would say that I have advised several others, and I wish to say the same to you, that I would probably take about \$6,500 for 80 by 100 to 110 ft., subject to usual commission, together with all remaining curbing and paving taxes and other taxes not delinquent. This portion rents at present for \$516 per year.

“Yours,

C. R. Lee.”

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On the bottom of this letter, as it appears in evidence, was written "Agency accepted." Shortly afterwards an agent of the Schlitz Brewing Company had some negotiations with plaintiff for the purchase of some property, and, among other portions of real estate, examined Mr. Lee's; but Lee's terms were too high and less than the whole plot of land mentioned was required by the brewing company, and the negotiations dropped. In December an agent for the brewing company visited Mr. Lee to get the name of the owner of the lot where the latter's office was situated, he being a tenant. He gave the desired information and in the conversation the subject of Mr. Lee's property at Sixteenth and Manderson streets was brought up and forty by one hundred and ten feet on the corner of the lot was sold for \$3,500.

The question seems to be whether plaintiff had such connection with the sale as entitled him to collect a commission for the making of it. Defendant's contention is that the sale was entirely independent of the plaintiff and was consummated directly between defendant himself and the agents of the brewing company.

Plaintiff commenced action in justice court for \$112.50, claiming a written contract of May 4, and that it was by his efforts that the sale of the following December to the brewing company was made. Judgment was entered in defendant's favor in justice court and on appeal also in district court. From the latter the present proceedings in error were taken and, as above stated, on the sole ground that the evidence shows conclusively the right of plaintiff to recover.

Defendant claims that at the very most the evidence is conflicting, and that the finding of the court as to whether or not plaintiff earned his commission on this sale should not be disturbed. Defendant also claims that the act of April 12, 1897, requires every contract, such as the one under consideration, to be in writing, signed by both parties, and that it should describe any land to be sold and fix the compensation for selling it.

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An examination of the evidence submitted fails to show that the trial court was wrong in its finding that the defendant was not indebted as claimed in the petition. The evidence seems conclusive, not only that the sale was not made by plaintiff, but could not have been made by him. He says himself that he had no authority to sell less than the whole eighty by one hundred and ten feet, nor to sell it for less than \$6,000. This was not done. If Mr. Frenzer endeavored to sell the property that was subsequently conveyed to the brewing company he must have acted without authority, and in defiance of his instructions, as testified to by himself. The agent of the brewing company says that he has no recollection of any attempt on plaintiff's part to sell the premises after July or August, 1897, and then only as to the whole eighty feet.

The negotiations in December for the forty feet were opened with defendant himself by the brewery people and their only negotiations with plaintiff were in regard to what he was authorized to sell, the whole eighty feet. He apparently had no connection with the final trade for a smaller quantity, and his negotiations as to the whole had definitely failed. For that matter the first negotiations, as to the sale of the eighty feet, were between defendant and the brewing company's book-keeper. If Mr. Frenzer had anything to do with the sale as consummated, the purchasers were unable to recall it.

Under the circumstances, it seems unnecessary to consider either the sufficiency of this letter of May 4 to fulfill our statute or the constitutionality of the statute itself. It seems clear that the sale in this instance was of defendant's own negotiation and the commission unearned. The arrangement between the parties was for an effort to sell the entire lot, and that distinctly failed. Mr. Frenzer did his work on those terms and can not complain that after his negotiations were at an end another and different arrangement was made by Mr. Lee himself. There was no claim of any exclusive right of sale to this property on plaintiff's part.

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It is recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

JOHN T. JONES V. THE FIRST NATIONAL BANK OF LINCOLN,
NEBRASKA.

FILED MAY 21, 1902. No. 11,852.

90 NW 912
Commissioner's opinion. Department No. 2.

1. **Banks and Banking: ACTS OF OFFICER OUTSIDE OF BANK: LIABILITY OF BANK.** As a general rule, acts done by an officer of a bank away from its place of business, and not authorized or ratified, are not binding upon it.
2. **Banks and Banking: ACTS OF OFFICER OUTSIDE OF HIS AUTHORITY: LIABILITY OF BANK.** The acts of a bank officer, outside the usual scope of his authority, in a matter to which it is no party and of which it is not chargeable with notice, do not bind the bank.
3. **Banks and Banking: FRAUDULENT ACT OF EMPLOYEE: NOTICE.** A bank is not chargeable with notice of the fraudulent act of its employee, outside the scope of his authority and in furtherance of his own personal designs, solely because he is an employee.
4. **Evidence: DIRECTION OF VERDICT: INFERENCES BASED ON TESTIMONY.** The inferences which may be drawn from the testimony in determining the propriety of a direction to find a verdict for one of the parties must have some reasonable foundation in the facts shown; mere guess-work and conjecture will not be indulged in.
5. **Banks and Banking: PAYING DEPOSIT TO PERSON NOT ENTITLED TO IT: ELECTION OF PARTY TO BE SUED.** A depositor, who claims that a bank has paid out his money to a person not entitled to receive it, has an election to sue the bank or the person who received the money; but can not proceed against each, unless in case of conspiracy or joint wrong.
6. **Banks and Banking: EFFECT OF EXERCISE OF SUCH ELECTION.** Prosecution to final judgment of a suit against the person to whom the money was paid is an election to treat the payment by the bank as proper and authorized, and will bar a subsequent suit against the bank for the amount of the deposit.

ERROR from the district court for Lancaster county
Tried below before CORNISH, J. *Affirmed.*

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Frederick Shepherd, for plaintiff in error.

Banks are chargeable with the knowledge of their cashiers and other officers of facts relating to transactions in the line of their business. *McLeod v. Fourth National Bank of St. Louis*, 20 Fed. Rep., 225; *The New Hope & Delaware Bridge Co. v. The Phoenix Bank*, 3 N. Y., 156; *Skinner v. Merchants' Bank*, 86 Mass., 290; *City National Bank v. Martin*, 70 Tex., 643; *Holden v. New York & Erie Bank*, 72 N. Y., 286. The bank is bound to know and control its subordinates and know what they are doing. Morse, Banks and Banking [4th ed.], section 128; *United Society of Shakers v. Underwood*, 9 Bush [Ky.], 609. The bank in this case should be held responsible for the fraudulent act of the cashier, or assistant cashier, amounting to the unfaithful keeping and the fraudulent paying out of its depositor's money, whereby the latter suffers loss. 2 Morawetz, Private Corporations, section 725 *et seq.*; *National Bank v. Graham*, 100 U. S., 699; *Baltimore & Potomac R. Co. v. Fifth Baptist Church*, 108 U. S., 317; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. [U. S.], at page 210; *Merchants' Bank v. State Bank*, 10 Wall. [U. S.], 609; *Fishkill Savings Institution v. National Bank*, 80 N. Y., 162; *Second National Bank v. Howe*, 42 N. W. Rep. [Minn.], 200.

W. E. Blake and Ames & Pettis, contra.

Any fraud or wrongful conduct of Miller, if such there was, in this transaction was not the fraud and wrongful conduct of the bank. *Innerarity v. Merchants' National Bank*, 1 N. E. Rep. [Mass.], 282; *Corcoran v. Snow Cattle Co.*, 23 N. E. Rep. [Mass.], 727. Knowledge of an officer of a corporation who is himself perpetrating a fraud will not charge such corporation with notice of such fraud. *Hummel v. Bank of Monroe*, 75 Ia., 689; *Findley v. Cowles*, 93 Ia., 389. To bind the bank in such a case it must be a party to the circumstances, or charged in some way with knowledge of the officer's act outside of his authority. *Wheat v. Bank of Louisville*, 5 S. W. Rep. [Ky.], 305.

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The plaintiff, having sued Stewart for the money in controversy, is barred from maintaining this action. He is bound by his election. *Terry v. Munger*, 24 N. E. Rep. [N. Y.], 272; *Fowler v. Bowery Savings Bank*, 21 N. E. Rep. [N. Y.], 172; *Crook v. First National Bank*, 52 N. W. Rep. [Wis.], 1131; *Equitable Life Assurance Society v. May*, 82 Ga., 646; *Crossman v. Universal Rubber Co.*, 27 N. E. Rep. [N. Y.], 400.

POUND, C.

This cause grows out of the transaction already before the court in *Jones v. Stewart*, 62 Neb., 207, 87 N. W. Rep., 12. Plaintiff's case, as stated by his counsel, is that on November 14, 1892, he had some \$2,600 on deposit in the defendant bank, which had remained there many years and of which he was entirely ignorant; that shortly before said date the assistant cashier of the bank disclosed the fact to one Stewart, an attorney at law, with a view to obtaining possession of the money; that thereupon said Stewart entered into negotiations with plaintiff which resulted in the curious transaction involved in *Jones v. Stewart*, whereby Jones, in consideration of \$100 in cash and the equity in certain city property, signed a paper the nature, contents and effect of which he did not know and was not to know, but which proved to be a check for the full amount of said deposit. Stewart drew out the money on this check and gave \$650 thereof to his informant. We think the evidence makes it reasonably certain that Miller, the assistant cashier, had left the bank on October 12, 1894, and was not in its employ at the time of the transaction in question. But one witness, a former employee of the bank, testifies, not very positively, that he was employed until the end of November of that year. Assuming that this would be sufficient to sustain a finding by a jury, we shall proceed upon the theory that Miller was still employed and was assistant cashier at the time. Stewart testifies that Miller came to him at his law office and told him about Jones' deposit,

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explained how it came there, stated the facts indicating that Jones had no knowledge of it, and inquired how he (Miller) could take advantage of the circumstances to make a profit for himself. Stewart was not the attorney of the bank, and it is very clear that Miller was acting solely on his own behalf and for his own ends. He had either just left the bank or was just about to leave it; and his manifest intent was to take advantage of what he had learned in the bank's employment for his own personal gain, unknown to its officers. When Stewart had obtained Jones' check and had received the money thereon he paid \$650 to Miller, as already stated. The district court, after hearing this evidence, directed a verdict for the bank.

The action of the trial court was entirely justified. It was no part of Miller's employment to give information as to the accounts of depositors for the purpose of defrauding them, and his conversation with Stewart, at the latter's office, was in no way binding upon or attributable to the corporation. As a general rule, acts done by an officer of a bank, away from its place of business, and not authorized or ratified, are not binding upon it. *Merchants' Bank v. Rudolph*, 5 Neb., 527; Zane, Banks and Banking, section 103. And no matter where done, the acts of such officer outside the usual scope of his authority, in a matter to which the bank is not a party, and of which it is not chargeable with notice, do not bind it. Zane, Banks and Banking, section 105; *Wheat v. Bank of Louisville*, 5 S. W. Rep. [Ky.], 305. This is especially true when the acts in question are wrongful and fraudulent. *First National Bank of Willimantic v. Bevin*, 72 Conn., 666, 45 Atl. Rep., 954; *School District v. DeWeese*, 100 Fed. Rep., 705, 709; *City Electric Street R. Co. v. First National Bank*, 65 Ark., 543, 47 S. W. Rep., 855. In *School District v. DeWeese*, *supra*, the court said: "It would be a far-reaching and dangerous doctrine to establish, when the cashier of a bank, acting in his individual capacity, and for his own aggrandizement, receives in trust, as the agent of

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a third party, property or money, that because he is at the time cashier and active manager of the bank, and, as a mere matter of book-keeping (done, doubtless, to cover up his own fraud), he first enters the proceeds on the books of the bank, to the bank's credit, and immediately passes the same to his own individual account, and forthwith checks the same out to his individual use; the bank should be affected with his guilty knowledge, and made to account for the fruit of his ill-gotten gains, when in point of fact the bank gained nothing in the end by the transaction." In the case at bar the bank had even less apparent connection with the transaction than in that case. All the bank did was to pay the check which Stewart procured from Jones. The act of informing Stewart was Miller's individual act, done for his individual ends. It was not part of Miller's business as assistant cashier, it was not done in that capacity, and no benefit or advantage accrued to the bank in any way. Nor is the bank chargeable with notice of or made a party to the scheme between Stewart and Miller merely because Miller was assistant cashier. A bank is not chargeable with notice of the fraudulent act of its employee, outside the scope of his authority and in furtherance of his personal designs, for the sole reason that he is an employee. *Innerarity v. Merchants' National Bank*, 139 Mass., 332, 1 N. E. Rep., 282; *State Savings Bank v. Montgomery*, 126 Mich., 327, 85 N. W. Rep., 879; *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 Fed. Rep., 433, 469; *Graham v. Orange County National Bank*, 59 N. J. Law, 225, 35 Atl. Rep., 1053. See *Tecumseh National Bank v. Chamberlain Banking House*, 63 Neb., 163, 88 N. W. Rep., 186. In *Innerarity v. Merchants' National Bank*, *supra*, it is said: "While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the

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fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating." It must be manifest that if Miller had informed the officers of the bank of what he was doing the whole scheme would have been frustrated.

We perceive no way in which the bank could be held in this case other than ratification or estoppel by reason of receiving and retaining some benefit or advantage growing out of Miller's act. There is no evidence from which ratification or estoppel can be found. On the contrary, it clearly appears that the whole benefit inured to Stewart and Miller individually. Counsel contends that an answer of Miller in his deposition to the effect that he did not know whether the bank got any of the money or not justifies the inference that it did, and requires submission of the case to a jury. But the inferences which may be drawn from the testimony in determining the propriety of a direction to find a verdict for one of the parties must have some reasonable foundation in the facts shown; mere guess-work and conjecture will not be indulged in. In the face of the clear and positive evidence as to what became of the money, a finding of a jury based on no more solid foundation than the inference drawn by counsel from Miller's evasive answer, could not stand for a moment.

Plaintiff's case, as made by his pleadings and proof, plainly proceeded upon the proposition that the bank was liable for the wrongful and fraudulent acts of Miller, its assistant cashier. But there are allegations in the petition and there is evidence which might be availed of to charge the bank on a different theory. It seems that the deposit was in the name of "John T. Jones, City Treas.," and that Stewart, after obtaining a check signed "John T. Jones," added the word "Treas." without authority, in order to obtain the money. The plaintiff alleged in his petition that the bank paid out the money upon a false and counterfeit check which was altered, false and forged

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upon its face, and offered to prove that a paying teller, in the proper exercise of his duty, would have seen the alteration. But we need not consider the effect of these allegations nor the admissibility of the evidence offered, for the reason that plaintiff had clearly cut himself off from any such cause of action before this suit was tried. In *Jones v. Stewart*, already referred to, he had sued Stewart, alleging that the latter received the money on that very check and that he had thereby lost his deposit. He prosecuted that cause to final judgment. Having elected to treat the check as valid and the payment to Stewart as authorized thereby, he can not afterwards assert the contrary position. Either Stewart had his money or the bank had it. Both could not have it. If the bank had the money, Stewart had the bank's money; and he was not liable to Jones, but to the bank. If Stewart had Jones' money, it was because the bank had paid it out on Jones' check, and the bank was no longer holden for the deposit. *Fowler v. Bowery Savings Bank*, 113 N. Y., 450. Looking at this suit as one based upon payment of the altered check, the two are entirely inconsistent.

We recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

PHOENIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD,
CONNECTICUT, APPELLEE, v. GEORGE WILLIAMS, APPEL-
LANT, ET AL.

FILED MAY 21, 1902. No. 11,862.

Commissioner's opinion. Department No. 1.

1. **Mortgage Foreclosure: OBJECTIONS TO APPRAISAL: TIME FOR MAK-
ING.** Objections to a confirmation of sale on the ground that the
appraisal was too low and that one of the appraisers was not a
freeholder come too late to be availing if made after sale had.
2. **Exceptions, Bill of: OMISSION OF AFFIDAVITS: APPEAL AND ERROR.**

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Affidavits used in the hearing of a question in the trial court will not be considered in this court unless embodied in a bill of exceptions properly settled and allowed.

APPEAL from the district court for Nuckolls county.
Tried below before SORNBORGER, J. *Affirmed.*

F. H. Stubbs, for appellant.

S. A. Searle, *contra*.

KIRKPATRICK, C.

This is an appeal from an order of confirmation made by the district court for Nuckolls county on December 6, 1900. Two objections are urged to the correctness of the order of the trial court: first, that the property was appraised too low, and much below its actual value; and, second, that one of the appraisers was not a freeholder at the time of the appraisement. The objections to the confirmation of the sale and to the appraisal were included in one instrument, which was not filed until after the sale had been had. Under the well settled rule in this court, an objection to an appraisal, except upon the ground of fraud, comes too late if made after sale. The objections therefore can not be considered.

It may be said, however, that the property appears to have been sold for two-thirds of what appellant himself claims it to have been worth. Therefore the action of the trial court in overruling the objections would be without prejudice. Regarding the other objection urged, that one of the appraisers was not a freeholder, the return of the sheriff, together with the statements of the freeholders, show that they were each freeholders at the date of the appraisement. While two affidavits are filed in the case, one alleging that the appraiser was a freeholder and the other that he was not, neither of these affidavits has been preserved in a bill of exceptions, and they are not so presented in the record that they can be considered. It is apparent that the action of the trial court in con-

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firming the sale was right, and it is therefore recommended that the order appealed from be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

ANDREW NELSON V. METZ BROS. BREWING COMPANY.

FILED MAY 21, 1902. No. 11,865.

Commissioner's opinion. Department No. 3.

Evidence: RIGHT OF DEFENDANT TO INTRODUCE TESTIMONY: DIRECTION OF VERDICT. When the answer is a general denial and the plaintiff has produced evidence tending to prove the allegations of his petition, it is error to refuse to permit the defendant to introduce contradictory evidence and to instruct the jury to return a verdict for the plaintiff.

ERROR from the district court for Douglas county. Tried below before ESTELLE, J. *Reversed.*

G. G. Bowman, for plaintiff in error.

Charles Ogden, *contra.*

AMES, C.

This action was begun by the defendants in error upon a petition which, so far as it needs to be recited in this opinion, alleges that in the month of November, 1897, the plaintiffs and defendant entered into an agreement by which the latter, who was a saloon keeper in Omaha, should purchase from the plaintiffs, who were brewers, all the beer that should be necessary for the conduct of the business of the former during the year 1898, and that in consideration of the agreement and in part fulfillment of it, the plaintiffs spent a considerable sum of money in refinishing and decorating the defendant's saloon, but that the defendant had committed a breach of the contract by discontinuing purchases of beer from the plaintiffs in May, 1898, and afterwards purchasing his supplies of that com-

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modity elsewhere. For these reasons the plaintiffs sought to recover the amount expended by them on the premises of the defendant. The answer is a general denial, coupled with a counter-claim or set-off, which does not call for further notice at this time. In his opening statement to the jury, counsel for the defendant denied the agreement, but admitted that the decoration and finishing sued for had been done by the plaintiffs for the defendant; asserting, however, that it was done, not in consideration of any contract or agreement between the parties, but as a present by the plaintiffs as showing an appreciation of the past friendship and business relations between the parties. Upon the trial two members of the plaintiff company testified each to a separate conversation with the defendant, in which the contract set out in the petition was agreed upon and entered into. The defendant then offered to prove, by his own oath as a witness, that neither of the alleged conversations ever took place and that no such an agreement was ever made or talked about between the parties. Upon objection by the plaintiffs this offer was denied and the evidence excluded, and the court instructed the jury to return a verdict for the plaintiffs. From a judgment on the verdict, the defendant prosecutes error to this court.

The district judge gave a reason for granting the plaintiffs' request for their instruction as follows: "The motion will be sustained for the reason that counsel for the defendant in open court has stated and in his opening statement to the jury did state that the work had been done, but that it had been done, not in consideration of a contract to furnish beer for the year 1898 or for any other time, but that the consideration was that the defendant had been a patron for a number of years past of the Metz Brewing Company." The exclusion of the evidence and the instruction were evident errors. The admission of the defendant, in the opening statement, that the work had been done, did not destroy or vitiate the general denial contained in his answer, but operated merely to dispense

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with proof in the particular mentioned. Neither was his denial of the agreement, and that the work had been done in consideration of it, inconsistent with his statement that the decorations had been made for another and different consideration which had been satisfied. These propositions appear to us as being too evidently true to require argument or authority for their support.

It is recommended that the judgment of the district court be reversed and a new trial granted.

DUFFIE and ALBERT, CC., concur.

REVERSED AND REMANDED.

THE STATE BANK OF PENDER ET AL., APPELLEES, v. MARY ANN FREY ET AL., APPELLANTS, ET AL.

FILED JUNE 4, 1902. No. 10,656.

Commissioner's opinion. Department No. 1.

1. **Creditors' Suit: INDEBTEDNESS SUBSEQUENT TO VOLUNTARY DEED.** A deed of real estate can not be avoided on the sole ground that it was voluntary by a creditor, to whom no indebtedness was incurred until after the conveyance.
2. **Limitation of Actions: RECORDING DEED: LACK OF KNOWLEDGE.** In an action, brought more than four years after the recording of a conveyance, to set aside for fraud, the plaintiff must show himself entitled to additional time because of lack of knowledge by both pleading and proof.
3. **Limitation of Actions: RECORDING DEED: WHEN BEGINS TO RUN.** The recording of a deed "when accompanied with circumstances sufficient to put a person of ordinary intelligence and prudence upon inquiry, which, if pursued, would lead to a discovery of the fraud," causes the statute of limitations to begin to run, "but not otherwise." *Forsyth v. Easterday*, 63 Neb., 887, 89 N. W. Rep., 407.
4. **Creditors' Suit: RECORDED CONVEYANCES: NOTICE.** Where parties are in actual possession and personal control of the lands and are farming them in connection with their home premises, and conveyances are promptly recorded with no concealment of the circumstances, the records are constructive notice of the deeds' existence.

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5. **Creditors' Suit: RECORDED CONVEYANCES: CREDITORS PUT UPON INQUIRY.** Creditors are chargeable, *prima facie*, with constructive knowledge of such conveyances, and in the absence of any good reason to the contrary, either pleaded or proved, are put upon inquiry as to their consideration.
6. **Counties: UNCONSTITUTIONAL ACT ATTACHING TERRITORY: ACTS OF RECORDER.** An unconstitutional act attaching territory to a county, accepted and acquiesced in, will suffice to render the acts of the register of deeds of such county, as to such territory, done before the law was declared unconstitutional, acts of a *de facto* officer.
7. **Limitation of Actions: WHEN BEGINS TO RUN: DISCOVERY OF FRAUD.** The statute of limitations "begins to run against a creditor from the discovery of the fraudulent act on the part of his debtor, whether the creditor's claim has been reduced to judgment or not." *Gillespie v. Cooper*, 36 Neb., 775.

- **APPEAL** from the district court for Thurston county. Tried below before EVANS, J. *Affirmed in part.*

Mell C. Jay, Guy T. Graves and Uriah Bruner, for appellants.

James H. Macomber and Anderson & Keefe, contra.

HASTINGS, C.

This is a suit by creditors' bill to set aside two conveyances of land and subject the premises to the payment of a judgment of the plaintiff bank against Charles H. Frey for \$4,009.76 and costs, dated May 27, 1895, and a judgment in favor of plaintiff, Pollock, against the same defendant for \$541.30 and costs, dated April 17, 1895, a transcript of which was filed December 10, 1895, and one in favor of plaintiff, Rupp, against the same defendant for \$448.77, dated May 8, 1894, and filed by transcript May 16, 1894, and one in favor of plaintiff, Bauman, against the same defendant, dated May 8, 1894, and filed by transcript May 16, 1894.

The first conveyance assailed is a deed of Charles H. and Mary Ann Frey, made December 12, 1886, to D. W. Britton, covering the southwest quarter of section 20, township 25 north, range 6 east, which was on the same

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day conveyed by Britton to Mary Ann Frey. These deeds were recorded in Wayne county July 12, 1887. The land had been conveyed to Frey thirteen days before the making of these deeds by Bauman, who held it from one Cummings who had entered it. It is called by the parties, and will be called here, the "Cummings" land.

The other conveyance assailed is a deed from Florence Miller, dated March 22, 1890, to Mary Ann Frey, covering the west half of the southeast quarter and the northwest quarter of the northeast quarter of section 8, township 25 north of range 6 east. This deed was recorded April 26, 1892, in Thurston county. The premises are called by the parties, and will be here referred to as the "Miller" land. This last deed seems to have been made when dated. Possession was given of the premises to Mrs. Frey, or to her and her husband, on a contract of purchase on which payments were made, and the deed remained in escrow till payment in full was completed, when it was delivered and recorded. The contract of purchase was recorded in Thurston county March 22, 1890. The trial court found that this was notice to plaintiff, and that any cause of action for fraud in the transaction was barred when this suit was commenced in June, 1895. The trial court also found that Charles H. Frey was insolvent in 1886 at the time of making the deed to Britton. It found Rupp's and Bauman's judgments both void for lack of sufficient service of summons. It found that there was no actual knowledge of the fraud in the deed to Britton on the part of the bank and Pollock, and that the recording in Wayne county was not constructive notice of anything. The judgments of the bank and of Pollock were decreed to be liens upon the "Cummings" land. The court finds that the indebtedness on these judgments was incurred prior to May 5, 1893.

We have in the first place the appeal of the defendant, Charles H. Frey, and wife from so much of the decree as subjects the "Cummings" land to the lien of the judgments of the State Bank of Pender and of John W. Pollock. Second, there is the appeal of the bank and of Pollock from the

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portion of the decree that finds their cause of action as to the "Miller" land barred by the statute of limitations. Finally, there is the appeal of plaintiffs, Rupp and Bauman, from the finding that their judgments were without jurisdiction of Frey's person, and that they have no right.

The appeal of the defendants is upon two contentions. First, that the evidence is insufficient to establish fraud as to the first mentioned premises, and, second, that the action is barred by the statute of limitations. The first branch itself divides into two, or rather three, viz., that Charles H. Frey never had an interest in the land, and only held title to it as trustee for the purpose of procuring a loan, and that only for thirteen days; that at the time he made the conveyance for a nominal consideration of \$1,900, he owed his wife more than \$3,000; and that plaintiffs held no indebtedness against him when the conveyance was made and no proof was submitted of actual fraud, except that the conveyance was voluntary. This, as to subsequent creditors, is claimed to be insufficient.

Perhaps the claim that the sheriff made no search for property on which to levy execution before this action was instituted should be also mentioned. It is not deemed necessary to refer to it further than to say that his return, while somewhat informal and not reciting any search for property, seems sufficient to indicate a complete lack of property on which to levy. There is nothing in the record to indicate any specific property of defendant on which he could levy, and for the purposes of this action his return will be held sufficient.

While the evidence hardly seems to warrant a finding that Charles H. Frey put any money into the purchase of the "Cummings" land, it does warrant the conclusion that he made the arrangement with Cummings under which the latter entered the land and that he borrowed the money to pay for it, the first installment of \$525 of Bauman, and then enough to pay this and the other two by a loan from Skeen & Riley. It appears clearly that the proceeds of this loan, except about \$90, went to clear up the title to

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the land embraced, a part of which was this "Cummings" land.

This first defense of a prior gift to Mrs. Frey by Cummings is not aided by the second one of money loaned to her husband. Whatever money the husband got was not at the time charged against him. There seems to have been no well defined distinction between the property of the wife and that of her husband, in those earlier years at all events, and there seems no good reason to doubt the correctness of the trial court's conclusions that this was essentially a voluntary conveyance though Mr. Frey seems to have obtained from his wife valuable property and money.

Two serious difficulties are in the way of the trial court's conclusions as to this "Cummings" land. First, as to the State Bank of Pender, the indebtedness nowhere appears to have been contracted until long after this deed was made. Of course, a deed may be set aside as fraudulent by subsequent creditors, but not merely on the ground that it was voluntary. This conveyance to the wife in 1886 is not fraudulent as to the bank's subsequently accrued claim, merely because it was voluntary. *Graham v. Railroad Co.*, 102 U. S., 148. The cases from the several states will be found in 24 Century Digest, 977. There is no claim that there is any evidence of an actual intention to defraud in this conveyance, and no fraud except that it was voluntary is alleged, except in general terms. It appears, however, that the judgment of John W. Pollock is based upon a note given in 1885, the year before this "Cummings" land was conveyed to Mrs. Frey. As to that claim, therefore, a deed voluntary must be held fraudulent unless it shall appear that the action is barred by the statute of limitations. This latter is the second difficulty.

The title to this land was first in Cummings, who entered it with money borrowed apparently by Frey from Bauman to whom Cummings conveyed the land as security. Bauman held it until within a few days of its conveyance by Frey to Britton and by the latter to Mrs. Frey. These

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last conveyances were on July 12, 1886, placed of record in Wayne county. The defendants claim that Mrs. Frey had then been in possession of the land for a year. As a matter of fact the land seems to have been farmed by "the boys," as Mrs. Frey testifies, and from the family home on the same section. If we assume that the land is Frey's, as the court finds, of course there was no such change of possession as to put a creditor on inquiry, but the placing of the title at the commencement in Bauman and from him so quickly in Mrs. Frey, by conveyances promptly recorded, of lands immediately in the possession of defendants nearly nine years before the commencement of this action, must be held a bar to its prosecution, if the record in Wayne county was constructive notice of the existence of the deeds, and if the fact that plaintiffs' claims had not been reduced to judgment prior to 1894 is not to be regarded.

The only allegation in the petition of plaintiffs as to lack of knowledge of the fraud is that they "had no knowledge, actual or constructive, of the deed." This allegation is repeated as to the second conveyance. The evidence is entirely wanting as to when the actual knowledge was obtained. There is no explanation of the failure to learn of these conveyances, except a statement as to plaintiff, Pollock, that he is a non-resident. The doctrine seems well established in this state that where more than four years have elapsed since the alleged fraud, the plaintiff must allege and prove the facts as to failure to discover it, which entitle him to proceed notwithstanding the lapse of time, and must show diligence. *Parker v. Kuhn*, 21 Neb., 413; *Hellman v. Davis*, 24 Neb., 793; *Wright v. Davis*, 28 Neb., 479; *Gillespie v. Cooper*, 36 Neb., 775; *Horbach v. Marsh*, 37 Neb., 22; *Forsyth v. Easterday*, 63 Neb., 887, 89 N. W. Rep., 407. The case last cited holds that the recording of a deed when accompanied by circumstances sufficient to put creditors upon inquiry will set the statute in motion. The "circumstances" in this case as to both deeds are as complete as they are likely to be in any, and were so rec-

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ognized by the trial court. Indeed, there was proof of specific knowledge at the time on the plaintiffs' part of the facts relating to the purchase of this "Miller" land. The effect of our decisions seems to be to make the discovery of the fraud and its time a question of fact with the additional doctrine that in equity a party has notice of a fact when he has knowledge enough to put him upon inquiry which, if followed, would give knowledge of that fact. To this it should be added that if the action is more than four years after the alleged fraud, the facts as to its discovery entitling the plaintiff to more than that time must be alleged and proved.

It appears, however, that these lands were made a part of Wayne county by the act of March 1, 1881. This act was held unconstitutional in *Wayne County v. Cobb*, 35 Neb., 231. At the end of the decision the remark is made, "The territory in question was never legally a part of said county." It is, consequently, urged that there was no legal recording of these deeds in that county so as to make them constructive notice to plaintiffs, and that no actual notice of the deeds themselves was proved. The learned trial court took the view set forth in *Wright v. Davis* and *Gillespie v. Cooper*, *supra*, that a proper recording of these conveyances is notice of their existence, and, if the circumstances are public and suspicious, is *prima facie* knowledge of the fraud in them. As we shall see, he refused to disturb the conveyance of the "Miller" land, because of the recording of a contract in Thurston county in 1890 together with a notorious possession at that time, but held that the recording in Wayne county was of no effect. In this it would seem there was error on the part of the trial court. The fact that the territory comprising this land was not "legally" a part of Wayne county would not prevent its being actually a part of it, nor render the acts of *de facto* officers, exercising jurisdiction there in the name of Wayne county, void. The law providing for the connection with Wayne county might be no law and void, but, until this was legally ascertained, acts of public officers under color of it might not be void.

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In *Norton v. Shelby County*, 118 U. S., 425, 6 Sup. Ct. Rep., at page 1127, Justice Field cites with strong approval from the opinion of Chief Justice Butler, *State v. Carroll*, 38 Conn., 449, the latter's statement of the circumstances under which an officer holds his place *de facto*. The fourth class of them, and the one discussed and approved by the United States supreme court in that case, which, however, was held to fall without it, is when the officer acts "under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such." The conclusion reached in *Norton v. Shelby County* was that the commissioners issuing the bonds were not *de facto* officers, because there was no such office. The law creating the office was bad, and so there was no such office. But the county clerk of Wayne county in filing and recording these instruments was acting under a valid and constitutional statute providing for his office and fixing its duties. The question was simply whether he should exercise this office as to the land in question, or whether the recorder in another county should do so.

The decision in *Wayne County v. Cobb* was not rendered until 1892, in a controversy that arose over the act of 1889 transferring these lands to Thurston county. The evidence is conclusive, and not attempted to be disputed, that the statute, though unconstitutional, was universally obeyed and the whole county government during those years administered at Wayne. Under such circumstances, there seems no question that the acts of the recorder who took charge of the conveyances of this district, while Wayne county was so accepted as the proper place of authority, should be deemed as valid as if the territory had been legally annexed.

The same Cooley's Constitutional Limitations [5th ed.], page 188, which plaintiffs cite for their emphatic declaration that an unconstitutional law is no law, says, on page 750 of the same edition: "An officer *de facto* is one who by some color of right is in possession of an office and for the time

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being performs its duties with public acquiescence, though having no right in fact." In the note on the same page is found the following: "As where the appointing body is acting under an unconstitutional law. *Ex parte Strang*, 21 Ohio St., 610; *Commonwealth v. McCombs*, 56 Pa. St., 436." The cases sustained the doctrine, as do the ample citations of Justice Field in *Norton v. Shelby County*, above. The election of their recorder by these people in Wayne county, though unconstitutional, was under color of right, was universally acquiesced in, and his acts must be treated as valid.

The doctrine that a municipal corporation, acting under color of law, whose existence is not questioned by the state can not have its existence or limits collaterally questioned is invoked also, and seems broad enough to cover the case. *Dillon, Municipal Corporations* [4th ed.], section 43a; *Tisdale v. Minonk*, 46 Ill., 9; *People v. Maynard*, 15 Mich., 463. And the same is true of the doctrine that a public corporation distinctly recognized by the state can not have its existence collaterally questioned by an individual. *People v. Farnham*, 35 Ill., 562; *Jamcson v. People*, 16 Ill., 257. As above suggested, however, the clearest view seems to come from regarding the recorder of Wayne county as the *de facto* recorder of the territory unconstitutionally annexed and his acts valid though the law was void.

Plaintiffs appeal from the finding that the statute of limitations is a bar as to the "Miller" land. In this matter it is claimed that the land was bought with Charles H. Frey's money and \$300 paid on it March 22, 1890. The land was bought for \$1,800, \$1,000 of which was represented by a mortgage on the land and \$300 paid cash, and contract for deed to Mary Ann Frey on payment of \$200 in one, and \$300 in two, years thereafter. The contract was signed, witnessed and acknowledged, and placed of record on the same day. The possession of the land was delivered at once and the land farmed by the family of Frey and wife with some hired help from that time. Offi-

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cers of the plaintiff bank seem to have known of this at the time. There seems to be no error in the finding that this possession with the recording of this instrument was notice to the world of Mrs. Frey's claim, and her husband's creditors, if they wished to contest her claim, should have proceeded within four years. There seems no occasion to disturb the findings of the trial court as to this land, unless the holding in *Gillespie v. Cooper*, that the time of reducing the plaintiffs' claims to judgment is unimportant, should be overruled.

The bank's judgment was not obtained until 1895. That of Pollock was in 1894. The indebtedness of the bank seems to have begun in 1888, but most of it dates from 1889 and 1890. Pollock's debt as before stated was incurred in 1885. The circumstances of the acquirement of this property and the recording of the conveyances seem clearly to raise the bar of the statute, if the latter begins to run as held in *Gillespie v. Cooper*, from the discovery of the fraud or of facts sufficient to put a creditor upon inquiry without regard to the time when the claims were put in judgment.

Plaintiffs' appeal from the finding that the statute had run as to the "Miller" land is not put on the ground that the time should be computed from the date of their judgments. It is put on the ground that the recording of deeds by itself is not sufficient notice of the fraud to them. This position is upheld by the case of *Forsyth v. Easterday*, 63 Neb., 887. The finding of the trial court is put upon the sole basis of the record of the contract. It is supported, however, by the fact of notorious possession and personal occupancy in connection with defendant's home farm, and by proof of knowledge of the transactions on the bank's part, and must be supported unless *Gillespie v. Cooper* is overruled as to its main point; just as the finding in reference to the "Cummings" land must be set aside if that case stands. That case has been much mooted. A dissenting opinion appears in it. It was evidently deliberately decided. It has been received as distinctly the law of this

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state, and was so accepted at the trial of this very case and in the argument of it before this court. The rule announced is apparently not in conformity with the weight of authority in other states, but it finds respectable support in other jurisdictions as well as in the terms of our statute. Its publication has been carefully limited in *Forsyth v. Easterday*, above. The accompanying *semble* that the fraud is discovered on the filing of the fraudulent deed has been in the last mentioned case, to a certain extent, repudiated. We do not care to add to the list of overruled cases in Nebraska by recommending a change.

The appeal of Rupp and Bauman from the finding that their judgments were without jurisdiction, and from the dismissal of their actions, need not be discussed. Whether the action of the trial court was right or not, they have no brief on file, and have no right to insist on an examination of their branch of the case. The statute of limitations is as fully a bar to their claims as to those of the other plaintiffs.

It is therefore recommended that the decree of the district court, so far as it is in favor of the plaintiffs, State Bank of Pender and John W. Pollock, be reversed and their action dismissed, and be affirmed as to the rest of the decree.

DAY and KIRKPATRICK, CC., concur.

The decree of the district court, so far as it is in favor of the plaintiffs, State Bank of Pender and John W. Pollock, is reversed and their action dismissed, and as to the rest of the decree is affirmed.

AFFIRMED IN PART.

PHOENIX INSURANCE COMPANY OF HARTFORD, CONNECTICUT, v. SHERMAN HOYT.

FILED JUNE 4, 1902. No. 10,666.

Commissioner's opinion. Department No. 1.

1. **Money Received: RENTS: ADVERSE POSSESSION OF DEFENDANT AGAINST PLAINTIFF.** One who is in adverse possession of premises under a tax deed is not liable in an action for money had and received on account of rents received by him while so in possession to the holder of the legal title who has never asked or obtained possession.
2. **Money Received: PLEADING: ANSWER AS TO RENT: JURISDICTION OF JUSTICE.** The allegations of defendant, in an action simply for money had and received, that the money was rent for real estate adversely held, may state a defense, but does not deprive the justice of jurisdiction.

ERROR from the district court for Harlan county. Tried below before BEALL, J. *Reversed.*

George W. Wright, for plaintiff in error.

R. L. Keester, *contra.*

KIRKPATRICK, C.

This is an action brought in the justice court of Harlan county by defendant in error, Sherman Hoyt, against plaintiff in error for money had and received. Plaintiff in error appeared in the action and moved to dismiss for want of jurisdiction of the court on the ground that title to real estate was involved. This motion was overruled. Plaintiff in error then filed a motion, supported by affidavit, asking the justice to certify the case to the district court on the ground that the justice had no jurisdiction. This motion was also overruled, and trial was had, which resulted in a judgment against plaintiff in error, from which an appeal was taken to the district court. Defendant in error filed in the district court a petition as for money had and received substantially in the language of

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the bill of particulars filed in justice court, to which plaintiff in error answered, denying generally, and pleading that title to real estate was involved, and that the justice had no jurisdiction, and in addition thereto set up the following: "For a third and further defense, this defendant avers that during the year 1893, and at the time plaintiff claimed to be the owner of the real estate described in plaintiff's petition, * * * this defendant was the owner, both equitable and legal, of said real estate, and the said Joseph Thresher was the tenant of this defendant, and in actual possession thereof by reason of a written lease therewith; that no relation of landlord and tenant existed at the time between plaintiff herein and the said Joseph Thresher as alleged in plaintiff's petition or any other contractual relation wherein arose any presumption or obligation on the part of the said Joseph Thresher to pay to the plaintiff herein the rental value of said property, amounting to sixty-one and 15-100 (\$61.15) dollars, or any other sum whatever." Subsequently an additional prayer was added to the answer by way of amendment which it is not necessary to consider. The case was tried upon a stipulation of facts. Judgment was entered by the court in favor of defendant in error and against plaintiff in error, a jury having been waived. From this judgment error is prosecuted to this court, and it is contended, first, that neither the justice of the peace nor the district court had jurisdiction of the subject-matter of the action, for the reason that title to real estate was involved; and, second, that the judgment of the district court is not supported by sufficient competent evidence.

The facts disclosed by the record are as follows: On the 11th day of August, 1891, the county treasurer of Harlan county executed to plaintiff in error a tax deed to the lands in controversy under a sale for taxes assessed for the years 1887, 1888, and 1889. Plaintiff in error took immediate possession of the premises under this tax deed, which was duly recorded, and on the 8th day of September, 1892, while so in undisputed possession, executed to one Joseph

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Thresher a written lease for the premises covering a period from the 12th day of August, 1892, to the first day of March, 1894, in consideration for which Thresher executed to plaintiff in error a promissory note, upon maturity of which, about the first day of March, 1894, he paid to plaintiff in error \$66.15, being the principal and interest due on the note for the rent of the premises during the time he was in possession. The testimony shows that some time subsequent to the time plaintiff in error took possession under its tax deed, it commenced foreclosure proceedings in the district court for Harlan county upon a mortgage which it had on the land. Such proceedings were afterwards had that on the first day of May, 1893, the sheriff of Harlan county executed to A. E. Whitcomb a sheriff's deed to the premises, which was duly placed of record. Whitcomb never took possession of the premises, and on the first day of June, 1893, he executed to Sherman Hoyt, defendant in error, a warranty deed for the premises, which was duly recorded. On the 12th day of October, 1897, defendant in error, Hoyt, executed a warranty deed for the premises to Robert H. Gresham. Joseph Thresher went into possession of the premises as the tenant of plaintiff in error in the fall of 1892, and his lease terminated on March 1, 1894; so that during the latter part of his term, that is, from June 1, 1893, until the end of his term, defendant in error had title to the premises under his sheriff's deed, but never during that time was he in possession.

The first contention of plaintiff in error is that under the statute the justice should not have entertained jurisdiction because the title to real estate was involved. This contention can not be sustained. The only question raised by the controversy was, who was entitled to the money which Thresher paid to plaintiff in error; and while this might to a certain extent depend upon who owned the land, or, at least, who was in possession of it, yet there would seem to be no valid objection why the justice did not have jurisdiction. This action is brought by the holder of the legal title under a sheriff's deed, who had never obtained

possession, and was brought to recover the rents paid by the tenant to his landlord who was in possession under a tax deed claiming adversely to the title of defendant in error. In such a case, the title to real estate is not involved, and the justice of the peace had jurisdiction.

It is next contended that the judgment is not sustained by sufficient evidence. This contention seems to be well taken. By the agreed statement of facts, which comprises all the evidence offered, it appears that plaintiff in error was in possession under its tax deed at the time it made the lease to Thresher; that Thresher went into immediate possession as its tenant, and so remained up to the first day of March, 1894, the day upon which his lease expired. It also appears affirmatively that A. E. Whitcomb, the grantor of defendant in error, never took possession, and whether or not defendant in error ever took possession of the premises prior to the time he parted with his title, October, 1897, nowhere appears in the record. But it does appear that he at least did not have possession up to the time of the expiration of the lease held by Thresher as tenant of plaintiff in error. This presents for consideration the question who was entitled to the rents and profits, plaintiff in error, who was in adverse possession by its tenant, or defendant in error, who had the title to the premises by virtue of a sheriff's deed, but who had never obtained possession thereunder. Plaintiff in error had purchased the land mentioned at tax sale for the delinquent taxes for a number of years; had taken from the county treasurer a tax deed therefor, and had been in the possession of the premises and was holding adversely to A. E. Whitcomb, who had procured the sheriff's deed, and who is the grantor of defendant in error. It is disclosed by the agreed statement of facts that plaintiff in error did not include its tax lien in its foreclosure proceedings, and has never received repayment of the money it invested in the purchase at tax sale, and, so far as disclosed by this record, it is still in adverse possession of the premises under its tax deed. What effect the foreclosure of its

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mortgage by plaintiff in error would have upon its lien for taxes is not involved in this controversy, and will not be considered, as we are dealing only with the possession of the premises. The rule is based upon sound reason, and seems to be abundantly supported by authority, that a tenant in possession, the title of whose landlord fails, and without fault on his part the lease is terminated, is entitled to the emblements, and while his tenancy may be at an end, he still has the right of ingress, egress and regress for the purpose of reaping that which he has sown. So that it seems clear that defendant in error could not have deprived the tenant, Thresher, of the fruits of his labor, even though the title of plaintiff in error, his landlord, had failed. *Sornberger v. Berggren*, 20 Neb., 399; *McKean v. Smoyer*, 37 Neb., 694; *Monday v. O'Neill*, 44 Neb., 724.

It seems equally clear and well settled that defendant in error can not recover this rent, if it has been paid to plaintiff in error, who was in possession of the premises by its tenant and was claiming title thereto adversely to that of defendant in error, in a proceeding such as that in the case at bar. To hold otherwise would be to permit a party in an action for money had and received to try the title to real estate instead of first establishing his right to possession by an action of forcible entry and detention or ejectment.

In the case of *Richardson v. Richardson*, 72 Me., 403, it is said: "Possession under adverse claim of title negatives the idea of a promise to pay rent. The disseizor is a wrongdoer, against whom a writ of entry or trespass for *mesne* profits in proper cases will lie, but the disseizee does not have the freehold or possession, on which he must rely in order to prove a promise to pay rent to him. The disseizor is a trespasser and can not be treated as a tenant. The tort can not be waived for the purpose of trying the title to lands in an action of assumpsit." *Bigelow v. Jones*, 10 Pick. [Mass.], 161; *Falcon v. Johnston*, 102 N. Car., 264; *Hartman v. Weiland*, 36 Minn., 223; *Barron v. Marsh*, 63 N. H., 107; *Stockwell v. Phelps*, 34 N. Y., 363.

Polk County v. Nance County.

It follows from what has been said that, under the agreed state of facts upon which this case was tried, defendant in error should not have been allowed to recover. It is therefore recommended that the judgment of the district court be reversed.

HASTINGS and DAY, CC., concur.

REVERSED AND REMANDED.

THE COUNTY OF POLK, NEBRASKA, v. THE COUNTY OF
NANCE, NEBRASKA.

FILED JUNE 4, 1902. No. 11,104.

Commissioner's opinion. Department No. 3.

Paupers: SUPPORT OF, BY COUNTY.

ERROR from the district court for Nance county. Tried below before MARSHALL, J. *Affirmed.*

E. E. Stanton and Albert Thompson, for plaintiff in error.

W. L. Rose and W. F. Oritchfield, contra.

AMES, C.

This is an action in which Polk county seeks to recover from Nance county the sum of \$267.65, expended by the former county for the support of a pauper who is alleged to have been, within thirty days prior to his becoming a public charge, a resident of the last named county. The question of fact involved was, by the trial court, left to the jury under entirely unexceptionable instructions, to which neither party took an exception. A verdict was returned in favor of the defendant county upon conflicting evidence. The judgment is brought here for review upon the sole ground that the verdict is not supported by sufficient evi-

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dence. That, under such circumstances, this ground alone is insufficient to justify a new trial has been repeated so many times within the last twenty-five years that it seems to have degenerated into a monotone and to have lost its power to affect the professional ear-drum. The costs incurred in this suit, besides those incurred in this court, are equal to the sum sued for. Such litigation at public expense ought not to be encouraged.

It is recommended that the judgment of the district court be affirmed.

DUFFIE, C., concurs.

ALBERT, C., took no part in the decision.

AFFIRMED.

WILLIAM STANSBURY V. STORER & ELLIS.

FILED JUNE 4, 1902. No. 11,380.

Commissioner's opinion. Department No. 3.

Appeal and Error: FINAL ORDER: ORDER DISSOLVING INJUNCTION. An interlocutory order dissolving a temporary injunction is not a final order or judgment reviewable in this court.

ERROR from the district court for Nuckolls county. Tried below before HASTINGS, J. *Petition in error dismissed.*

Cole & Brown, for plaintiff in error.

S. A. Searle, contra.

AMES, C.

The plaintiff in error begun an action to perpetually restrain the defendants from doing certain acts to the alleged irreparable injury of the former, and at the beginning of the action obtained a temporary injunction as prayed. The defendants interposed a general demurrer to the peti-

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tion. After argument upon the demurrer the court made and entered the following order:

"Now on this 26th day of September, A. D. 1899, this cause came on for hearing on demurrer to the petition, on consideration whereof, and the court being fully advised, said demurrer is sustained, to which ruling of the court the plaintiff duly excepts, and plaintiff not desiring to plead further, it is by the court, considered, ordered, adjudged and decreed, that said injunction heretofore granted as a temporary injunction herein be, and the same is hereby, vacated and set aside. To which said ruling of the court the plaintiff excepted."

No supersedeas bond was ever made or tendered, and no further or other order or judgment was ever made in the action, which so far as appears from the record, is still pending in the district court. For aught that appears it is still within the competence of that court to vacate the order and grant a new injunction, and, notwithstanding the order, the court may still permit an amendment of the petition and upon final hearing decree a perpetual injunction as prayed. We do not think the act of 1889, entitled "An act to provide for supersedeas bonds in certain cases," is in any respect applicable to this record. There has been no final judgment or order rendered in the case, and the petition in error therefore presents nothing for review. *Clark v. Fitch*, 32 Neb., 511, and cases cited.

The order of the district court, although rendered after a hearing upon demurrer, is merely interlocutory and not reviewable in error or upon appeal.

It is recommended that the petition in error be dismissed.

ALBERT and DUFFIE, CC., concur.

PETITION IN ERROR DISMISSED.

First Nat. Bank of Plattsmouth v. Petersen.

THE FIRST NATIONAL BANK OF PLATTSMOUTH, NEBRASKA,
APPELLANT, v. JOHN C. PETERSEN ET AL., APPELLEES.

FILED JUNE 4, 1902. No. 11,405.

Commissioner's opinion. Department No. 3.

Creditors' Suit: SUFFICIENCY OF EVIDENCE. Evidence examined, and
held to support the judgment of the district court.

APPEAL from the district court for Cass county. Tried
below before RAMSEY, J. *Affirmed.*

A. N. Sullivan, for appellant.

C. S. Polk and H. D. Travis, *contra.*

DUFFIE, C.

This action was brought by the appellant to subject certain lands standing in the name of Martha J. Petersen to the satisfaction of three judgments held by said bank against John C. Petersen, the husband of Martha J. These judgments were entered in the county court of Cass county on August 2, 1898, transcribed to the district court, and on August 20 executions were issued thereon, which, it is alleged, were returned wholly unsatisfied September 16, 1898. It is stated in plaintiff's petition that John C. Petersen is wholly insolvent, and that in May, 1897, he conveyed the premises sought to be reached in this proceeding to his wife, Martha J. Petersen; that such conveyance was without consideration and made for the purpose of hindering and delaying the plaintiff and other creditors of Petersen, all of which said Martha J. well knew. The answer of Martha J. Petersen, in addition to denying many of the allegations of the petition, alleges that the conveyance to her was for a valuable consideration and that no fraudulent purpose was entertained in making the same. A decree was entered dismissing the plaintiff's bill, from which this appeal was taken.

First Nat. Bank of Plattsburgh v. Petersen.

We think the evidence fully supports the decree. A brief statement of the facts, which we think are established by the evidence, is the following:

Petersen has resided in the city of Plattsburgh since 1882, and from that time up to March, 1898, was engaged in the meat business. In the fall of 1889 he was married to Martha J. Petersen, who was a widow having a considerable estate of her own. After the marriage each party appears to have looked after and managed their own property. In January, 1890, Petersen borrowed from his wife \$1,000, giving his note therefor. Part of this money he used in purchasing four acres of the land involved in this controversy and the balance in the settlement of some business matter with his brother. In March, 1894, Petersen bought another lot containing five acres of land, and in March, 1895, another lot containing one acre, taking the deeds in his own name but using the money of his wife in paying for the same, and there is evidence sufficient to support a finding that in the purchase of these two lots he was acting solely as agent for his wife, and that the title was taken in his own name that he might make an effort to have these lots, together with his own, making altogether a tract of ten acres, taken out of the corporate limits of the city. May 17, 1897, Petersen conveyed the two lots last above mentioned, together with the four-acre lot purchased in 1890, to his wife, the claim being that as regards the two lots last purchased they were her property, being purchased by him as her agent, and that as to the four-acre lot which he had purchased in 1890 the conveyance was made in payment and satisfaction of the note for \$1,000 given his wife for borrowed money in January, 1890.

The evidence is practically undisputed that since 1882, when he first commenced business in Plattsburgh, Petersen had an account with the bank, being indebted to it at one time in the sum of \$5,000 and during a large part of the time to the amount of \$1,000 to \$1,500. He was apparently doing a large and successful business and his

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ability to pay his debts was not seemingly doubted until shortly before the bank put its claims into judgment. That his credit was good with the bank is apparent from the fact that two of the three judgments on which this suit is based are for debts for which he was surety for other parties, and the cashier of the bank testified that for ten years prior to 1898 he had been indebted to the bank to an amount as large as he was owing in January of that year. No officer of the bank ever examined the records to ascertain whether the title to the property in dispute stood in the name of Petersen; Petersen never represented to the officers of the bank that he owned the property, and Mrs. Petersen had no knowledge that he was indebted to the bank.

We can see no reasonable ground upon which an estoppel can be urged against Mrs. Petersen to assert her claim to this property. No additional credit appears to have been extended to him on the assumption that he was the real owner of the property bought with the money of his wife, and the bank officials had no actual knowledge that the title of record stood in his name. The real cause of Petersen's inability to pay all his debts appears to be the shrinkage in property values occurring about the time of the maturity of this debt.

We recommend the affirmance of the judgment.

AMES and ALBERT, CC., concur.

AFFIRMED.

JAMES C. MCNERNEY, APPELLANT, v. HERBERT A. HUBBARD ET AL., APPELLEES, IMPEADED WITH FRANK E. BUNDAY, APPELLANT.

FILED JUNE 4, 1902. No. 11,510.

Commissioner's opinion. Department No. 3.

Fraudulent Conveyances: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* sufficient to support the judgment of the district court that a conveyance was not made with the intent to defraud creditors.

McNerney v. Hubbard.

APPEAL from the district court for Lancaster county. Tried below before FROST, J. *Affirmed.*

James C. McNerney, pro se, S. B. Pound, for appellant, Bunday.

Hallck F. Rose, contra.

DUFFIE, C.

On the 1st of June, 1895, Herbert A. Hubbard and Mylon E. Hubbard became sureties for C. B. Jordan upon two notes payable to David Fitzgerald. One of these notes, for \$275.75, was indorsed to J. C. McNerney, an appellant herein. The other note, for \$350, was indorsed to Frank E. Bunday, another appellant. December 17, 1898, judgment was entered in the county court for Lancaster county in favor of J. C. McNerney on the note held by him for the sum of \$349 and costs of suit; and January 24, 1899, judgment was entered in the county court of Lincoln county in favor of Frank E. Bunday for \$275.21 and costs upon the note indorsed to him. Transcripts of these judgments were afterwards filed in the office of the clerk of the district court for Lancaster county and executions issued thereon and returned unsatisfied. The judgment in each of these cases was against Charles B. Jordan, as principal, and Herbert A. Hubbard and Mylon E. Hubbard, as sureties.

For some time prior to the entry of these judgments the Hubbards were the owners of Hubbard Place, an addition to the town of Havelock, with the exception of a right of way through said addition owned by the Chicago, Rock Island & Pacific Railway Company, and a few lots which were owned by other parties. May 12, 1899, the appellant, McNerney, commenced this action in the district court for Lancaster county against Herbert A. Hubbard and Louise, his wife, Mylon E. Hubbard and Allie M., his wife, Charles B. Jordan and the Hubbard Bros. Company, a Nebraska corporation, the petition alleging the recovery

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of the plaintiff's judgment, the transcribing of the same to the district court, the return of an execution unsatisfied, and the prior ownership by the Hubbards of the plat known as Hubbard Place. It is further alleged that on the 28th of February, 1898, the Hubbards had conveyed said property to the Hubbard Bros. Company, a corporation organized under the laws of the state of Nebraska; that Herbert A. Hubbard was president of said company and Mylon E. Hubbard secretary and treasurer; that no consideration was paid for said conveyance and the same was made with the intent on the part of Herbert A. and Mylon E. Hubbard to defraud their creditors, of which intent the Hubbard Bros. Company had full knowledge at the time of taking its conveyance. It is alleged that the land so fraudulently conveyed is of the value of \$10,000, but that it can not be sold on execution for sufficient to pay plaintiff's judgment by reason of the cloud of the deed from Herbert A. and Mylon E. Hubbard to the Hubbard Bros. Company. A decree is asked cancelling the said deed and for an order that the land be sold on execution to satisfy plaintiff's claim.

Frank E. Bunday filed a cross-bill, alleging the same facts substantially as are set out in the plaintiff's petition and asking the same relief. The defendants, except Hubbard Bros. Company, answered by general denial. The answer of the company alleges that long prior to receiving a conveyance of the property in question Herbert A. and Mylon E. Hubbard were indebted to Enoch Hubbard for money loaned in the sum of \$5,000, for which he held their note of date April 1, 1895, and on which interest had been paid to September 1, 1895; that on the 9th of September, 1897, they mortgaged "Hubbard Place" to Enoch Hubbard to secure this note, and that the note was afterward paid and the mortgage satisfied by issuing certificates of stock of the face value of \$5,000 of the Hubbard Bros. Company, which were accepted by Enoch Hubbard in payment of his note and mortgage.

For reply to this answer the appellants say that Enoch

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Hubbard is the father of Herbert A. and Mylon E. Hubbard, and that if any note or mortgage was executed to him the same was fraudulent and without consideration and made for the purpose and with the intent of hindering, delaying and defrauding creditors; that the mortgage, if made, was never recorded and was never intended between the parties thereto to be a *bona fide* incumbrance on the property. It is further alleged that the defendant corporation was organized for the purpose of enabling Herbert A. and Mylon E. Hubbard to cheat, hinder and delay their creditors, and was so treated and considered by all the members of the corporation and the holders of stock therein. A decree went in favor of the defendants, from which decree the plaintiff and Frank E. Bunday, cross-petitioner, have appealed to this court.

That the defendants Herbert A. and Mylon E. Hubbard mortgaged the premises in controversy to Enoch Hubbard to secure a note for the sum of \$5,000 is beyond dispute. The mortgage is dated and acknowledged September 9, 1897, and while the evidence of any consideration for the note made by Herbert A. and Mylon E. Hubbard to their father is not of a satisfactory character, we can not say that the finding of the court is unsupported by the evidence. Neither can we say that the circumstances of the case are conclusive that the conveyance from the two Hubbards to the corporation was intended to defraud their creditors. It will be remembered that the Hubbards were sureties only upon these notes and it does not appear that they were being pressed for this or any other indebtedness, except, perhaps, a debt due the First National Bank, which was paid and satisfied at the time the corporation was formed. They had a right to suppose that Jordan, the principal debtor, would pay these notes, and it is hardly conceivable that they would form a corporation and transfer to it their entire property, which appears to have been of considerable value, for the purpose of evading payment of these two small claims for which they were not principally liable and which at that time

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were not being pressed against them. It is true that the stock of the corporation is all owned by the two Hubbard brothers, their wives and their father, and that the affairs of the corporation appear not to have been conducted in the most business-like manner. Ten shares of stock were issued to the wife of each brother, but the claim is made that this was for the purpose of inducing them to sign the deed to the corporation and to release their dower in the premises. On the case made we do not feel that we should interfere with the finding of the district court, and therefore recommend that the decree appealed from be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

JAMES C. MCNERNEY, APPELLANT, v. HERBERT A. HUBBARD ET AL., APPELLEES, IMPEADED WITH FRANK E. BUNDAY, APPELLANT.

FILED FEBRUARY 17, 1903. No. 11,510.

Commissioner's opinion. Department No. 1.

1. **Fraudulent Conveyances: FRAUDULENT INCORPORATION: BONA FIDES.** The question of whether or not the incorporation of Hubbard Bros. Company was fraudulent, *held*, to depend upon whether or not the \$5,000 indebtedness of Hubbard Bros., a partnership, to Enoch Hubbard, whose payment was the main object of incorporating, was *bona fide*.
2. **Fraudulent Conveyances: SUFFICIENCY OF EVIDENCE.** Evidence *held* sufficient to uphold the finding of the trial court, and former judgment of affirmance adhered to.

REHEARING of case reported *ante*, page 104.

APPEAL from the district court for Lancaster county. Tried below before FROST, J. *Former judgment of affirmance adhered to.*

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James C. McNerney, pro se, S. B. Pound, for appellant, Bunday.

Halleck F. Rose and W. B. Comstock, contra.

HASTINGS, C.

This case is a rehearing of one which appears *ante*, page 104, and in 91 N. W. Rep., 245, where it is held that the evidence would support a finding of no fraud in the mortgage to the elder Hubbard, which was paid off when the Hubbard Bros. Company corporation was formed, and none in the formation of the corporation itself. No objection is made to the statement of the issues in the former opinion.

The sole question raised is the rightfulness, upon the evidence, of the decree in favor of defendants. This depends upon the answers to these two questions: Was the \$5,000 mortgage, by Herbert A. and Mylon E. Hubbard and their wives to their father, given for a sufficient consideration; and was the formation of the corporation of Hubbard Bros. Company fraudulently entered into as against these appealing creditors of Herbert A. Hubbard and Mylon E. Hubbard? The former question is important only in its bearing upon the latter. Indeed, it comes into the case only in the answer and reply. The answer sets up, as one of the reasons for incorporating, the providing for this \$5,000 indebtedness, which was done by means of stock in the corporation. The land mortgaged to the father the previous year was conveyed to the company and the mortgage surrendered. The reply alleges that the father's claim was fictitious and that the incorporation was in order to pay it, and therefore fraudulent.

Some doubt as to the validity of the consideration for this mortgage is indicated in the former opinion in this case and seems to have been the main cause of the rehearing. The case rests, so far as these disputed questions are concerned, upon the testimony of Herbert A. Hubbard. The father died in 1899. Mylon E. Hubbard

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is working for Swift & Co. of South Omaha, apparently as traveling salesman, and does not testify. No one else appears to have any direct knowledge of the transactions. The rehearing application asserts that his testimony shows, first, that Hubbard Bros. were in financial difficulties from 1892 till the time of their incorporation, and in planning the corporation a serious question was "how to get out of their indebtedness." Pages 35, 36 and 51 of the testimony are cited to support this. Herbert A. Hubbard admits that they were not able to pay taxes and keep interest from accumulating against them from that time. At page 51 he was asked, at what time prior to the incorporation he began to work out the plan to form it and straighten up their affairs. He replied:

Probably the fall before.

Q. You started along in 1897?

A. Yes, sir; there was a question of how we were going to get out of our indebtedness.

Q. This mortgage was made while you were looking about for some such plan?

A. Yes, sir. It was made in this manner: We owed \$3,500 to the First National Bank, and father's claim was due and we could not make settlement with that and we wanted to pay that and we wanted to secure my father.

Q. You wanted to put this on in case you had trouble with the bank?

A. We made settlement with the First National Bank and turned over the papers and notes.

Q. Did the First National Bank have any security of any kind?

A. No, sir; not only our personal notes, sir.

The \$5,000 note was first given to the father in 1892. No definite amount of money is testified to as advanced, except \$500 prior to 1880. When they formed the corporation in 1898 they were, and had been since 1892, embarrassed by debts, and one of the serious questions was how to "get out of our indebtedness"; but there is nothing necessarily indicating an intention at that time

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to get out in any other way than by paying out, unless the father's claim is held spurious.

Appellants claim, second, that the evidence shows both of the notes in question in this action, on which appellants' judgments are based, were known to be past due and unpaid, and that plaintiff was urging payment. To this pages 45, 62 and 63 of the testimony are cited.

Q. Did you have this Bunday note in mind at all when you incorporated?

A. No, sir.

Q. Did you know as a surety you would be at that time called upon to pay that note?

A. No, sir. The first notice I had had for a year or two previous to that was we were sued by Bunday at North Platte. The last notice we got was from the Merchants' National Bank, claiming to own this note, and we got notice from them two or three years previous, and the next notice we got from North Platte.

Q. At the time you incorporated you had notice that the note was due and you had been asked to pay it?

A. Yes, sir; but this note, when it was a renewal, was for \$550, and it was partly paid at the Merchants' National Bank.

Q. By whom?

A. By Jordan; he paid it down from \$550 to this amount that was sued for, and we did not hear anything after that for a year or such a matter until we got notice we were sued in Lincoln county for it.

Q. You had been notified in May, 1897, to pay it, hadn't you?

A. I think I got from the Merchants' Bank a notice that the note was partly paid and for us to look up the matter, and I went to see Jordan and Jordan said he would attend to it; and then the next time the next notice we got was that we were sued in Lincoln county by a man by the name of Bunday.

Q. The notices you got were in 1897 from the bank, weren't they?

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A. I don't know; it was sometime previous to the failure of the bank; and after the bank failure we expected to hear from this note from the receiver of the bank, but after the bank failed we got [no] notice from the bank that we owed them that or any other note, and the next notice was from Lincoln county.

Q. Then at the time the bank closed its doors, in May, 1897, or after it failed, you expected to hear from the bank or the receiver about it?

A. Yes, sir, if it hadn't been paid.

Q. That was the summer of 1897?

A. Yes, sir; but we didn't hear and supposed it was paid.

Q. If the bank did fail in 1897 and the receiver was appointed in the summer of 1897, it was about then that you say you expected to hear from the receiver about this note?

A. Well, I expect so; but we hadn't heard up to the time we incorporated, but supposed the note was paid. The first notice we got of the note was being sued by Jordan out at North Platte.

As both the notes held by appellants were dated June 1, 1895, and were for installment payments on the same transaction, and were due, respectively, August 14 and September 1, 1895, this testimony shows that more than a year after their maturity Hubbard Bros. had notice that they were unpaid. There is apparently nothing else in the record to show that at the time of the incorporation, in March, 1898, Mr. Hubbard did not, as he says he did, suppose that Jordan, the principal maker, had settled these notes.

Appellants also claim, third, that the mortgage of the father was not recorded and was made to hinder collection by the First National Bank, and the following is cited:

Q. You say at the time you drew this mortgage you were owing the First National Bank thirty-five hundred dollars and endeavoring to make a settlement with them,

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and your object in making this was not to record this, but to secure this claim and make it prior to that of any other claim?

A. Yes, sir.

Q. You wanted to secure this \$5,000 before any other creditor could get it or attach your property?

A. Yes, sir.

Q. How did it happen that you did not record that mortgage?

A. I didn't have it, he had it.

Q. As a matter of fact you didn't expect that to be recorded at all unless you had to do it to give priority to this claim, I suppose that was the object?

A. That is evidently what was done with it.

These answers certainly indicate that so far as H. A. Hubbard was concerned, and so far as his statements could bind his brother, the original intention of the \$5,000 mortgage, which was made to the father, was to enable the latter to hold property against other creditors in case of emergencies, and that the mortgage was kept from the record for the purpose of preserving the credit of the makers; but this fact has no direct bearing, for the reason that the indebtedness held by appellants was already past due when this mortgage was made. The indebtedness to the First National Bank, which the witness admits he was to provide a preference against, has been settled by means of this very corporation, fraud in whose formation is the alleged basis of this action.

Appellants' next claim is that the evidence shows that the father in 1892 received a house and ten lots from this tract of land without consideration, and pages 40, 52 and 61 of the testimony are cited. From them it appears that the mother of Herbert A. Hubbard and M. E. Hubbard is living on the premises and that a deed was made to the father for the house in which she lives and ten lots, for which nothing was paid or credited, and the witness says that the house and these lots "practically should belong to us." The father seems to have

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farmed the entire tract while he lived and the mother continued his possession. The value of these ten lots does not appear.

To the claim that H. A. Hubbard and M. E. Hubbard, after the incorporation, conducted the business solely as their own and as they had done prior to incorporation, pages 24 to 32 of the testimony are cited.

Q. When you incorporated the assets of the partnership were turned over to the company were they not?

A. Yes, sir.

Q. How much did the partnership have in the way of assets?

A. It had these lots, stock and the fixtures.

Q. What did you have in the way of goods?

A. I can't tell.

Q. You and he run the business, didn't you?

A. Yes, sir.

Q. What did you get?

A. Seventy-five dollars per month.

Q. What salary does your brother get?

A. Seventy-five dollars per month.

Q. What position does he hold in the company?

A. He is secretary and treasurer.

Q. How much does the corporation owe you?

A. I don't know.

Q. Don't your business books show how much the corporation owes you?

A. We don't keep any books.

Q. Well, how do you know whether you owe the corporation or it owes you?

A. I know that I get my living out of it and there is never anything left over.

Q. Will the books show how much you get?

A. No, sir.

Q. Well how do you keep square between yourselves?

A. We have never kept a personal account.

Q. How did you get money?

A. Whenever we wanted any money and there was any on hand we took it.

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Q. You got your salary anyhow, didn't you?

A. If there was any money we took it.

Q. What did your father get?

A. He got a living.

Q. Did he get money as an employee of the corporation or as a stockholder?

A. Well, he was entitled to some proceeds of the business.

Q. Does he own stock in the corporation?

A. Yes; he was a stockholder.

Q. What was the dividend on the stock?

A. We never declared a dividend.

Q. What did he get?

A. I don't just know. I know he got flour, meat and whatever else he needed that was in the store.

Q. When did he die?

A. The 10th of May.

Q. Who owns the stock now since his death?

A. I don't know.

Q. Who is administrator?

A. There is none.

Q. What property did he leave?

A. I don't know just what he did leave.

Q. Did he leave a will?

A. No, not a last will.

Q. You said there was no last will, what did you mean by that?

A. Well, there was an agreement.

Q. What was that?

A. That my brother should have the \$5,000.

Q. Has he got it?

A. I don't know.

Q. Which brother is to have that claim?

A. I don't know.

Q. What other property did the corporation own besides the stock?

A. About two hundred and thirty lots which are incumbered.

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Q. What are they incumbered for?

A. There is about \$2,000 due on taxes on them.

Q. How does your mother get her living?

A. Out of the corporation.

Q. Don't you pay her any money?

A. No, sir.

Q. Don't you know how much she gets?

A. Not exactly.

Q. Don't you keep any account of it?

A. I kind of keep it in my head.

Q. Now at the time the corporation was organized you were made president and your brother treasurer?

A. Yes, sir.

Q. Your wives and your father directors?

A. Yes, sir.

Q. Has there been any change made since it was organized?

A. No, sir.

Q. Did you have a regular election in 1899?

A. We met out to my brother's house and talked.

Q. You had a regular election at that time?

A. Well, we agreed to hold the same offices.

Q. Was your wife there?

A. I represented her stock.

Q. Have you a memorandum or book regarding that meeting?

A. I think my brother has.

Q. Is your brother in South Omaha working for Swift & Co?

A. Yes, sir.

Q. He has nothing to do with the corporation now, has he?

A. Yes, just the same as if he was here.

Q. Does he get a salary?

A. No, sir.

Q. How much does he get?

A. Nothing, practically nothing now.

Q. Does his family?

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A. No, sir.

Q. Who takes his place as secretary and treasurer in the corporation?

A. He is still secretary and treasurer.

Q. Who performs the duties as such?

A. I do.

Q. When there is any money in the treasury what do you do with it?

A. There has never been anything left over.

Q. You have drawn money for the last month?

A. Yes, sir.

Q. How much did you take out?

A. I don't remember.

These questions and answers embody the main part of the testimony, supporting the assertion that the brothers have continued to conduct the business just as if it was their own ever since the incorporation, and that it was, at the time of the trial of this case, being handled and managed by Herbert A. Hubbard as if he owned it and its profits distributed by him at his own will. This seems clearly established. Does such management of the corporation conclusively show its formation and the deed to it to be fraudulent?

To the sixth claim, that the corporation was a mere cloak to protect the property of Herbert A. Hubbard and M. E. Hubbard from their creditor, the entire testimony of Herbert A. Hubbard is cited. The strongest part of it, perhaps, is that just quoted, showing how absolutely the brothers controlled the disposition of its property and profits for their own use. As before stated, Herbert gives the only account we have of the main facts in this case; or, rather, he gives two accounts. In August, 1899, he was examined on proceedings in aid of execution in the Bunday case. His testimony then covers thirty pages. At the hearing of this case he testified again at about the same length. His testimony shows that he was then about forty-four years old; that something over twenty years previously he and his brother came to Lincoln and had

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continuously worked together ever since,—at first as employees in a brick yard, subsequently in keeping a meat market; that in 1892 they were carrying on this and were engaged in various real estate speculations in and around Lincoln. They had become possessed of this eighty-acre tract of land adjoining the village of Havelock, which was laid out as an addition. They owed the First National Bank a considerable sum; their property was mortgaged. They were unable to keep up their taxes and pay the interest on the mortgages and to the bank. They gave a note of \$5,000 to their father, Enoch Hubbard, as has been stated. The latter is stated by his son to have failed twice, to have been engaged in the mill business, and to have been a general speculator in Massachusetts. He came west about 1890 and in 1892 the brothers gave him the note. In 1897 the liabilities became still more pressing and they gave him a mortgage for \$5,000 on the Hubbard Place addition. They had in connection with their father built some houses on some of the lots in this addition to Havelock and made sale of them and in 1898, with notes and mortgages taken for them and with one block out of the land, they succeeded in satisfying the First National Bank on its claim; the other claims, with the exception of appellants, held mortgage securities which are apparently still in process of liquidation.

Herbert A. Hubbard's statement of the circumstances and purpose of the incorporation is as follows:

Q. Did you incorporate for the purpose of defrauding any of your creditors?

A. I can explain that.

Q. Explain.

A. At the time we incorporated we were owing the First National Bank thirty-five hundred dollars, and we were back on the taxes since 1892, and owing our father and he was willing to go into this corporation, and he had some houses there that had been sold on monthly payments. We fixed up a deal with the First National Bank and satisfied their claim of thirty-five hundred dollars.

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We gave a note and mortgage on those houses and we deeded enough property to satisfy them. The object of the incorporation, as much as anything else, was to satisfy my father and get in shape so we could borrow a little money on it and straighten up the taxes.

Q. And taking in your father?

A. Yes, sir; and we satisfied every one of the debts that was outstanding prior to the incorporation and this Jordan note, this Jordan, we signed his note * * * I want to explain this matter to show that I didn't feel as though we owed any note.

That the arrangement with his father was in the nature of a final settlement seems hardly possible in view of his statements in answer to question 436:

Q. The indorsement of interest made, if any, on the note are all the sums actually paid?

A. Yes, sir. We paid some interest, we are behind some interest on it.

The incorporators were the Hubbard brothers, their wives and their father. The business of the corporation was to be, and was, simply that of carrying on the meat market and real estate speculations in which the brothers had been engaged. It was to commence March 1, 1898, and terminate March 1, 1923. Capital stock was \$20,000. Limit of indebtedness was \$13,333. Its business was to be conducted by three directors, who from their number should choose a president, vice-president and secretary and treasurer. H. A. Hubbard was to be president, Enoch Hubbard, vice-president, and Mylon E. Hubbard, secretary, until their successors were elected, which never took place.

On March 1, 1898, the minutes indicate a meeting of the three Hubbards as directors. The articles were formally adopted, notice of incorporation was ordered published, Hubbard Bros.' offer of their market at 1304 O street, with all the stock, fixtures, good-will, accounts and credits, horses and wagons, at \$2,000 in capital stock of the company was accepted. The stock certificates were

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to be delivered on receipt of bill of sale. The offer of the two Hubbard brothers and their wives with Enoch Hubbard, the father, of this real estate, known as Hubbard Place addition to Havelock, except the lots conveyed away, was accepted at the price of \$18,000 to be paid for in capital stock of the company at par as follows: \$1,000 to each of the wives in consideration of their dower; \$8,000 to Enoch Hubbard in consideration of his unrecorded mortgage and \$4,000 each to H. A. Hubbard and M. E. Hubbard, owners of the fee, and upon execution of a deed of conveyance the stock was to be delivered. M. E. Hubbard and H. A. Hubbard were appointed managers. According to Mr. Hubbard's testimony, no books were kept by Hubbard Bros., the partnership, except a memorandum of credit sales, and none others were kept by the new corporation. The amount of the \$5,000 note in 1892, the witness says, was fixed by his father's memory. So far as he knows no accounts were kept by his father, but he said that the sons owed him \$5,000 and they took his statement. Though the son could recall but one definite loan of \$500 more than twenty years before, he knows they got money from time to time and had no doubt his father's memory and statement of the amount was correct.

Appellants claim that the following legal principles applied to these facts must give them a decree: First, their judgments, \$624 in amount, are not so small as to negative fraudulent intent in making the conveyances. Second, relief should not be refused, because appellants were not urgently pressing their claims when the conveyance was made; the creditors' forbearance should not protect the debtors' fraud. Third, liability of Hubbard Bros., as sureties, is as much protected by the statute of frauds as if they were principals. Fourth, the burden of clearly showing good faith in transactions between Hubbard Bros. and their father in the matter of alleged loans is upon them. Fifth, the like burden rests upon the corporation as to conveyances to it, since the incorporators are the debtors, their wives and their father.

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That a deed to a corporation whose members are all relatives should require as clear a showing of good consideration as any other deed to relatives, would seem reasonable. The corporation, however, is a public body. The property deeded to it is still there. It has simply been put into a common fund, and instead of the property itself, the former owner who has deeded it has his certificates of stock showing his ownership of a proportional share of the fund. It would seem no harder to reach the property in this form than in any other. If it appears, simply, that the debtor has put his property into a corporation and has received stock to its full value, his creditor has no right to complain, if the stock is not juggled with.

It is claimed here that the articles of incorporation were evidently prepared in such a way as to make it difficult to follow the stock. No citation of the provision in the articles intended to produce such effect is made. A somewhat careful examination fails to show any which would necessarily have that effect. The liberal powers given the officers, under which they have certainly managed the business and property as owners, is all that might be criticised.

The application of \$8,000 of the stock to the payment of this mortgage, and of \$2,000 to the wives for their dower interest in this land, whose value, defendants say, is overestimated by plaintiffs' witnesses at \$5,000, are the circumstances that seem to bear hardest upon the defendants. Mr. Hubbard's statement above, that the main object of incorporating was to dispose of the indebtedness to his father, shows that if such indebtedness was spurious, the entire transaction must be held to be tainted with fraud. If this \$5,000 indebtedness can be reasonably upheld on the testimony, the fact that the incorporation has made no difference in the management and control of the business and property, and that it was done to provide for the direct indebtedness of the firm, and left only the brothers' interest in the corporate stock to answer for these security notes, should not be held to vitiate the whole corporation.

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Has the requirement that in transactions between relatives good faith must be clearly shown where the result of such transaction is to protect such relatives at the expense of other creditors been met in this case? One of the sons says that about twenty years ago \$500 were borrowed at one time which he knows of; that other sums whose amount he does not know were obtained from time to time during the earlier years of Hubbard Bros. in Nebraska. No accounts were kept and no note given. In 1892, when the firm was getting embarrassed, a \$5,000 note was given. Some interest is indorsed as paid, but none for 1896. In 1897 a mortgage is given for \$5,000 and the next year it was taken up with the \$8,000 of stock in the corporation of Hubbard Bros. The father's recollection was taken as to the amount of the indebtedness in 1892.

Counsel for defendants say that this evidence is not contradicted. Counsel for appellants say that it needs no contradiction because it is not sufficient to uphold a mortgage to a father. The former opinion says it is not "satisfactory." It is not so to us, but it was to the trial court. We are not entirely convinced that the trial judge was wrong. He saw this witness, whose statements seem frank enough in their own confession of incompleteness and lack of definite knowledge. He had better opportunity than we to determine as to the truth of this claim of a general indebtedness to the father, and of good faith in making the note of 1892, and the mortgage of 1897. If this indebtedness was genuine, appellants should be required to find and apply the corporate stock held by their debtors and not disturb the arrangement for its payment. In truth, the witness' lack of candor in locating the stock and his apparent desire to avoid, as far as possible, a clear statement as to where or how it could be reached is a circumstance against him which should have weighed strongly with the trial judge and no doubt did. Without, however, an entire assurance that the district court was wrong, its finding of fact should not be disturbed.

Union P. R. Co. v. Stanwood. Estate of Fitzgerald v. Union Savings Bank.

It is recommended that the former judgment be adhered to.

KIRKPATRICK and LOBINGIER, CC., concur.

FORMER JUDGMENT ADHERED TO.

NOTE.—A second rehearing in the above cause was granted and upon submission an opinion was filed, November 18, 1903, by the court in which the former judgments of affirmance were adhered to. This opinion is reported in 97 N. W. Rep., 1118.—REPORTER.

UNION PACIFIC RAILROAD COMPANY V. SARAH N.
STANWOOD.

FILED JUNE 4, 1902. No. 11,619.

Commissioner's opinion. Department No. 3.

NOTE.—The first opinion in this case is by AMES, C., with a dissenting opinion by DUFFIE, C., and the judgment of the district court is reversed and remanded for a new trial. A rehearing was afterwards granted and upon a resubmission an opinion was written by POUND, C., in which he recommends a reversal of the former opinion and an affirmance of the judgment below. In an opinion *per curiam* the opinion of POUND, C., and the dissenting opinion of DUFFIE, C., are adopted as correctly stating the law upon the points discussed, and the other points involved in the case are held to be correctly disposed of in the first opinion, which was written by AMES, C. The recommendation of POUND, C., is adopted and the judgment of the court below affirmed. This final opinion was filed February 17, 1904, and all the above-mentioned opinions will be reported together in the official reports.—REPORTER.

ESTATE OF JOHN FITZGERALD, DECEASED, AND MARY FITZGERALD, ADMINISTRATRIX OF SAID ESTATE, V. UNION SAVINGS BANK OF LINCOLN, NEBRASKA.

FILED JUNE 4, 1902. No. 11,659.

Commissioner's opinion. Department No. 2.

Corporations: STOCK SUBSCRIPTION: LIMITATION: CLAIM AGAINST ESTATE. *Estate of Fitzgerald v. Union Savings Bank*, 65 Neb., 97, 90 N. W. Rep., 994, followed in a case of the same nature.

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ERROR from the district court for Lancaster county.
Tried below before CORNISH, J. *Affirmed.*

James Manahan and T. J. Doyle, for plaintiffs in error.

Lambertson & Hall, *contra.*

POUND, C.

This case involves the same facts as *Estate of Fitzgerald v. Union Savings Bank*, 65 Neb., 97, 90 N. W. Rep., 994. For the reasons stated in that case, we recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

FRIEDERICKE LAU, APPELLANT, v. JOHANNA C. BLOMBERG ET AL., APPELLEES.

FILED JUNE 4, 1902. No. 11,681.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: APPEAL: REVIEW OF CONDUCT OF ACTION IN TRIAL COURT.** An appeal does not bring up for review errors in the conduct of the action in the court below.
2. **Bills and Notes: PAYMENT INDORSED BY MISTAKE: EFFECT: ERASURE.** Indorsements of payment entered by mistake or inadvertence on a note do not become a part of the instrument and their erasure does not avoid the note.
3. **Bills and Notes: PAYMENT INDORSED BY MISTAKE: APPLICATION OF PAYMENT.** An indorsement of a payment on a note made without the maker's knowledge or assent is not an irrevocable application of the payment to that note where the payee also holds other obligations against the payor.

APPEAL from the district court for Saunders county.
Tried below before SORNBORGER, J. *Reversed and decree entered.*

Willard E. Stewart and Good & Slama, for appellant.

L. E. Gruver, *contra.*

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HASTINGS, C.

This is an appeal from decree of the district court for Saunders county dismissing the plaintiff's claim for foreclosure of a mortgage on the ground that there have been fraudulent alterations in the note, which the mortgage was given to secure, by the effacing of certain indorsements on the back of it.

January 16, 1899, Charles J. Blomberg, deceased, prior to the commencement of this action, was indebted to Hans P. Lau in the sum of \$949.96 for merchandise; he executed at that date to Lau a demand note for that amount and a note for \$400, together with a mortgage upon real estate in Saunders county to secure the latter, on which this action is brought. At the same time he made another note for \$549.96 in Lau's favor. The two smaller notes were for the same indebtedness as the first; the \$400 note, like both the others, bore interest at ten per cent. per annum. It matured January 18, 1896.

April 5, 1898, a petition to foreclose the mortgage securing the \$400 note was filed in Saunders county by Helene Lau as executrix; May 2, 1898, answer and cross-petition of Anderson and Almquist, praying for a foreclosure on a mortgage on the same property given by Blomberg in their favor to secure \$500 and interest from September 11, 1896, was filed in the same action. On May 17 trial was had on plaintiff's petition and the answer of Anderson and Almquist and the default of Johanna Blomberg, executrix, and of the heirs of C. J. Blomberg. A decree was entered foreclosing the plaintiff's mortgage for the sum of \$537.85 as a first lien, and Anderson and Almquist's mortgage for \$583 as a second lien, and ordering sale of the mortgaged premises. On the same date, Johanna Blomberg, executrix, filed a request for stay. Sale was had on this decree in March, 1899, and the property bid in by Almquist and Anderson.

April 14, 1899, Johanna Blomberg, Victor Anderson and C. H. Almquist filed a petition to vacate the decree, setting

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out that Blomberg died early in 1897; that the defendants named had no personal knowledge regarding plaintiff's claim; that they made diligent inquiry and were informed that nothing had been paid on the note; that the note introduced by plaintiff in evidence had shown no indorsements and decree was entered for the amount apparently due on it; that the defendant, Johanna Blomberg, supposing the decree was correct, requested a stay of order of sale; that at the expiration of the stay Anderson and Almquist procured order of sale and the property was sold to them March 28, 1899, for \$700, which was its reasonable market value, and on that day they discovered, upon a close examination of the note, the fact that there were indorsements upon it aggregating \$156.67, all made prior to March 14, 1896; that opaque paper was neatly pasted over the indorsements and rendered them invisible to the naked eye in the ordinary course of business and that thereby the note was materially altered and rendered void; that defendants had used diligence but acquired no knowledge of such alterations prior to March 28, 1899, and asked that the decree be set aside. August 7, 1899, the default of Helene Lau, executrix, was entered to this petition, a finding made, simply, that defendants' petition should be sustained and the decree set aside, and the decree was set aside. December 18, 1899, a decree was entered dismissing the action brought by Helene Lau, foreclosing Anderson and Almquist's mortgage and directing its payment out of the proceeds of the sale already had and that the remainder of such proceeds be paid to Johanna Blomberg. December 19, Friedericke Lau appeared and objected to the jurisdiction of the court and moved the court to set aside the decree of December 18, because she was the sole party in interest in the note and mortgage sued upon by Helene Lau, having such interest after the first decree and before June 10, 1899; second, because no summons had ever been served upon her on the petition for new trial; and third, asking the court to set aside the order confirming the sale of the premises for the same reasons. The

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decree of December 18 was set aside and Friedericke Lau allowed to plead by January 1, 1900. Some time subsequently, the date not appearing in the record, a motion was made by the defendants, Blomberg, Anderson and Almquist, to set aside this last action of the court, and on January 22, 1900, the order of December 19, 1899, was set aside; Friedericke Lau, residuary legatee, was substituted for Helene Lau as plaintiff. On the same day Friedericke Lau filed her motion to vacate and set aside the decree of December 18, 1899, because neither she nor Helene Lau had had any notice of the pendency of the proceedings to obtain a new trial or that any such new trial had been granted on August 7, 1899; second, because the decree of December 18 was rendered without any default being first taken; third, because the decree of December 18 was based upon the order of August 7, 1899, granting a new trial, which last was irregularly obtained in that it was upon a petition filed after a decree of foreclosure, after stay taken, and the sale of the mortgaged premises, upon which petition no summons was issued until more than one year from date of the original decree and no summons ever served on Friedericke Lau or Helene Lau; fourth, because plaintiff had a valid lien upon the mortgaged premises which had merged in the first decree of foreclosure. On the same day Friedericke Lau, substituted as plaintiff, filed a "special pleading" denying the fraudulent alterations; setting out the facts as to her claim, death of H. P. Lau, appointment of Helene Lau as executrix, the instituting of the original foreclosure proceedings, obtaining the decree, request for stay, præcipe for order of sale by Anderson and Almquist, sale of premises to them for \$700; that they had paid no part of it; their petition in connection with Johanna Blomberg for her trial; that summons was issued May 5, 1899, returned not served; that on June 3 another summons was issued on that petition which was delivered to the sheriff of Lancaster county June 9, 1899, and indorsed by him served personally on Helene Lau, executrix, and on June

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11 mailed to defendant's attorney, and on June 20, 1899, long after its return day, filed in the clerk's office; that service of summons was not had upon the substituted plaintiff or upon Helene Lau; that the petitioners had full knowledge of the memorandum on the back of the \$400 note at the time it was offered in evidence; that the items on the back of the note were properly credited upon the \$949.96 note to which the \$400 note was merely collateral security; that the payments were all properly indorsed upon the \$949.96 note; that the petition for the new trial was entirely insufficient to support the order entered upon it; that it contains no allegation of diligence; that the alleged discovery of the memorandum on the \$400 note is immaterial and would have been of no value, because they represented no payment on that note; asking that all subsequent proceedings be set aside and the original decree be reinstated and carried into effect. This application was sustained to the extent that the judgment by default of December 18, 1899, was again vacated and the case set for hearing upon its merits; the costs of the term were taxed to plaintiff, to which she excepted.

April 14, trial was had upon this last petition of the plaintiff, answer of defendants and reply of plaintiff and the evidence, and the court found for the defendants and against the plaintiff; found the facts as to the execution of the notes as above stated and found that H. P. Lau, in his lifetime, or someone authorized by him, with the consent of C. J. Blomberg, in his lifetime, indorsed certain payments to the amount of \$156.62 on the \$400 note; that these indorsements were covered with opaque yellow paper so as to obliterate them; that this was done by Helene Lau or by H. P. Lau in his lifetime or by their procurement, with intent to defraud; that the indorsements became a part of the note; that their obliteration was a material alteration and avoided the note and mortgage and that no action would lie to foreclose the latter, and dismissing plaintiff's cause of action.

April 28, plaintiff filed a motion to set aside this decree

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and for leave to file motion for new trial, for reasons set out in affidavit. The accompanying affidavit of Charles H. Slama is that he is one of the associated attorneys, resident of Wahoo; that W. E. Stewart is a resident of Lincoln and one of the attorneys for the plaintiff; that within two days after the trial Stewart forwarded a motion for new trial, with twenty-eight assignments of error, to Good and Slama requesting that it be filed if decree was against plaintiff; that the motion was received April 4, 1900; that the court took the decision under advisement and rendered no decree until April 14, 1900; that such action of the court was without notice to, or the knowledge or presence of, plaintiff's attorneys or either of them; that on April-7, the court informed plaintiff's attorneys that decree would be rendered in the above case; that on their appearance the court stated that a request had been made for special findings of law and fact and decree could not be rendered for a few days; that as soon as such findings were prepared they should be informed; that the court was not in regular session after April 4, nor every day in attendance at the court house but had not adjourned; that during several days, from April 4 to 14, no business was transacted by the court and the plaintiff's attorneys learned for the first time on April 23, of the rendition of the decree, nine days after it was filed; that it was then too late to file motion for new trial, which motion would have been filed for new trial if plaintiff's attorneys had had knowledge of the rendition of the decree. This motion and application was overruled and supersedeas bond fixed and given in the sum of \$600.

It is now urged that there is no competent evidence in support of the final decree; that the refusal of leave to file motion for new trial was an abuse of discretion; that decree is without finding, general or special, in favor of defendants; that the new trial proceedings were not instituted within one year of the original decree; that Helene Lau was not executrix when the new trial pro-

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ceedings were commenced; that the petition for new trial is insufficient to confer jurisdiction of the subject-matter or to support the decree for a new trial.

The last subject of complaint it is hardly worth while to discuss. The proceedings to obtain a new trial seem to have been based upon section 318 of the Code of Civil Procedure or upon subdivision four of section 602. In either event, such proceeding seems not to be properly classed as an independent action and not appealable. *Iler v. Darnell*, 5 Neb., 192.

If no appeal would lie directly from the action of the court in granting the new trial, it is hard to see how the rightfulness of the court's action in regard to it can be reviewed on this appeal from the final decree. At most, the action of the court was erroneous. An immediate review on error is provided, but the appeal in equity is not a proceeding to correct errors. *Ainsworth v. Taylor*, 53 Neb., 484.

The appeal in this case, as in the one last cited, must be taken as a waiver of errors and a declaration that plaintiff "is content to retry the cause in the supreme court upon the evidence" submitted below. The petition for a new trial seems not to have set forth facts sufficient to show a defense. It does not allege any payments upon plaintiff's mortgage. It refers to the covering of the indorsements as a "wrongful and fraudulent material alteration" but entirely fails to allege the facts necessary to make it so. The finding on this petition does not in terms "adjudge" that there is a *prima facie* defense to the action. As no defense is set out in the petition, it is hard to see how a mere finding that the petition should be sustained can be construed as such an adjudication. Section 606 of the Code seems to require such an adjudication and various *dicta* of this court have affirmed its necessity. *Gilbert v. Marrow*, 54 Neb., 77; *Baldwin v. Burt*, 54 Neb., at page 293; *Thompson v. Sharp*, 17 Neb., 69; *Gilcrest v. Nantker*, 47 Neb., 58; *Western Assurance Co. v. Klein*, 48 Neb., 904; *Bankers Life Insurance Co. v. Robbins*, 53 Neb., 44;

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Clark v. Charles, 55 Neb., at page 207. If an appeal in this court, however, is to be merely a re-examination of the issues upon the admitted evidence and the record, any error in granting the new trial must be deemed waived. The same is true as to the other complaints, except as to the weight of the evidence.

That evidence seems clearly insufficient to sustain a finding that the payments represented by these indorsements were made on this \$400 note. These payments, as far as the evidence, aside from the indorsements themselves, shows, were made upon the general indebtedness represented by the \$949.96 note which first came due. The indorsements on the \$400 note were merely proof, as far as they went, that the payment had been applied on this note. Presumptively, they were indorsed with Blomberg's consent and by agreement of the parties. *Chamberlain v. Chamberlain*, 116 Ill., 480; *Giddings v. McCumber*, 51 Ill. App., 373; *Norcross v. Theurer*, 3 Rob. [La.], 375; *Morris v. Morris*, 5 Mich., 171. This presumption, however, might be rebutted by competent evidence showing accident or mistake in the indorsement. *Tubb v. Madding*, 1 Minor [Ala.], 129; *McDaniels v. Lapham*, 21 Vt., 222; *Tobey v. Barber*, 5 Johns. [N. Y.], 63; *Morris v. Morris*, 5 Mich., 171.

That the fraudulent erasure of such an indorsement ought to be held to avoid the note is perhaps true, but we are unable to find any case that gives such effect to erasure of indorsements of payments. There are, on the contrary, cases holding such an indorsement a mere receipt and no part of the instrument itself, and the obliteration of it would not, therefore, avoid the note. *Kimball v. Lamson*, 2 Vt., at page 142, citing *State v. McLeran*, 1 Aiken [Vt.], 313; *Commonwealth v. Ward*, 2 Mass., 397.

In both *Giddings v. McCumber*, 51 Ill. App., 373, and *Kimball v. Lamson*, *supra*, the effect of finding the erasure of an indorsement of payment is discussed and held to be simply to entitle the maker to have the sums rightfully indorsed go in reduction of the amount of the note.

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The cases cited in the books as to alterations of indorsements avoiding notes seem to refer to a technical indorsement for the purpose of transfer, and even this is deemed no part of the instrument as to the original parties and prior indorsers. *Kennon v. McRea*, 7 Port. [Ala.], 175; *Curry v. Bank of Mobile*, 8 Port. [Ala.], 360; *Commonwealth v. Ward*, 2 Mass., 397; *Warner's Executors v. Spencer*, 7 J. J. Marsh. [Ky.], 341; *McDaniels v. Lapham*, 21 Vt., 222. The last two cases hold indorsements of payments no part of the note, but mere receipts. To the same effect is *Tobey v. Barber*, 5 Johns. [N. Y.], 68; Daniels, *Negotiable Instruments*, section 1396.

The mere writing of an indorsement on the back of a note of the amount paid, where the maker had no notice of it, would not seem to be an irrevocable application of the money so indorsed to the discharge of the instrument. The citation of Daniels, *Negotiable Instruments*, section 1251, by defendant in error to the proposition that such indorsement would constitute an irrevocable application is not fortunate. In all cases cited by Daniels to this proposition the application was with notice to the debtor, and the author's note is to the effect that where the debtor had no notice of the application, the rule is otherwise; citing *Hankey v. Hunter*, 2 Peake [Eng.], 107. In *Mayor of Alexandria v. Patten*, 4 Cranch [U. S.], 316, Chief Justice Marshall held it error to instruct a jury that application by the creditor must be recent after the payment. He thought its application remained in the payee's control, after payment without application, till the action of the payee was assented to by the debtor.

The evidence in this case is that Blomberg was notified of, and assented to, an application of these payments upon the large note. This is not denied and, if true, there was no wrong in taking them off the \$400 note. If there was no application by the parties, the law would put them on the large note. Daniels, *Negotiable Instruments*, section 1252.

The indorsement as to "Collateral Acct.," which was

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also covered, is mentioned neither in the petition for a new trial nor in the amended answer. It seems not material to the rights of the parties. It might become so if the principal note should be paid, but there is no claim of such payment.

For the reason that the evidence at the final trial does not disclose a defense even to the extent of the amount of the indorsements, it is recommended that the final decree of the district court be reversed, and a decree entered in favor of plaintiff for \$690 and costs, and on payment of same the title in the mortgaged premises be quieted and confirmed in defendants, Almquist and Anderson, under their purchase of March 18, 1899.

DAY and KIRKPATRICK, CC., concur.

The final judgment of the district court is reversed and decree of foreclosure entered in plaintiff's favor in the sum of \$690 and costs, and on the payment of the same the title in the mortgaged premises is quieted and confirmed in defendants, Almquist and Anderson, under their purchase of March 18, 1899.

REVERSED AND DECREE ENTERED.

JAMES L. BROWNE, APPELLANT, v. PAULINE CROFT ET AL.,
APPELLEES.

FILED JUNE 4, 1902. No. 11,695.

Commissioner's opinion. Department No. 3.

Appeal and Error: PROCEEDING TO OBTAIN NEW TRIAL IN EQUITY: APPEAL. A final order by a district court made in a statutory proceeding, under section 602 *et seq.* of the Code, to obtain a new trial in an action in equity, is not reviewable by this court upon appeal.

APPEAL from the district court for Douglas county.
Tried below before FAWCETT, J. *Appeal dismissed.*

W. A. Saunders, for appellant.

Charles Ogden and Joel W. West, contra.

Browne v. Croft.

AMES, C.

The appellant, James L. Browne, obtained a decree in the district court for the foreclosure and sale of certain real property for the satisfaction of certain alleged liens thereon. Afterwards the appellees, Pauline Croft and John T. Croft, applied to the court by petition under section 602 *et seq.* of the Code, for an order vacating the judgment and granting a new trial because of unavoidable casualty depriving the petitioners of an opportunity to defend. After a hearing the prayer of the petition was granted. From this latter judgment or order the plaintiff appealed to this court. The appellees move to dismiss the appeal. It is quite clear that the motion should be granted. The proceeding sought to be reviewed is purely statutory and presents no matter of equitable cognizance of which this court can acquire jurisdiction by appeal. This proposition seems to us too clear to require the citation of authorities in its support or any extended argument.

It is recommended that the appeal be dismissed.

DUFFIE and ALBERT, CC., concur.

APPEAL DISMISSED.

Opinion on rehearing follows.

JAMES L. BROWNE, APPELLANT, v. PAULINE CROFT ET AL.,
APPELLEES.

FILED JANUARY 21, 1903. No. 11,695.

Commissioner's opinion. Department No. 1.

Appeal and Error: ORDER OPENING DECREE: FINAL ORDER. "There can not be a review of an order of the district court opening a judgment and permitting an answer to be filed in the case until there has been a further order or judgment in its nature final." *Merle & Heaney Mfg. Co. v. Wallace*, 48 Neb., 886.

REHEARING of case reported *ante*, page 133.

Browne v. Croft.

APPEAL from the district court for Douglas county. Tried below before FAWCETT, J. *Former judgment of dismissal adhered to.*

W. A. Saunders, for appellant.

Charles Ogden and Joel W. West, *contra*.

HASTINGS, C.

This is a rehearing of the case which appears *ante*, page 133, and in 91 N. W. Rep., 177. It was there dismissed on the ground that it was not appealable for the reason that it presented no question of equitable cognizance, but was merely a statutory proceeding. A rehearing has been allowed presumably on the authority of *Morse & Co. v. Engle*, 26 Neb., 247. That case holds distinctly that an application to open a decree such as we have here is not a new action, but a proceeding in the original one. The action on it is therefore to be considered as taken in the original equity case and, if final, is appealable. As stated in the former opinion, the action was originally brought to foreclose tax liens; a decree by default was entered; a petition was filed by the defendant, Croft, to open that decree under section 602 of the Code; a demurrer to Croft's petition was filed, which was overruled, and the decree vacated and Croft given leave to answer in the original action. Plaintiff excepted to such action, declined to plead to the petition to vacate, and attempted to take an appeal from the order opening the decree and allowing Croft to answer. The former opinion seems to have been correct in finding that the appeal should be dismissed.

The ground on which it is claimed that the appeal will lie is that the petition to vacate is merely an ancillary proceeding in the original action and a final order in such proceeding is a final order in the original action. Tried by such a test, the order in question is not a final one. It merely vacates the decree and allows Croft to answer

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and leaves the original action undetermined in the trial court. Considered as an order in the original action, the opening of the judgment and permitting Croft to answer, is anything but final. Such is the holding in *Merle & Heaney Mfg. Co. v. Wallace*, 48 Neb., 886. The holding in *Iler v. Darnell*, 5 Neb., 192, and *Morse & Co. v. Engle*, 26 Neb., 247, does not militate against this view. In each of those cases the appeal was by defendant and the order appealed from must therefore have been a denial of the right to open and consequently final. Evidently the same rule must be applicable to an equity case on appeal as to a law case on error. The same thing is reviewable in each case, namely, "the judgment rendered or final order made." If, as the case of *Merle & Heaney Mfg. Co. v. Wallace* decides, an order vacating a judgment and permitting an answer is not final in a law case, it can not be more so in an equity case.

It is recommended that the judgment of dismissal heretofore rendered in this case be adhered to, for the reason that the order sought to be appealed from is not final as to the original foreclosure case, in which alone the appeal is allowed.

KIRKPATRICK and LOBINGIER, CC., concur.

FORMER JUDGMENT OF DISMISSAL ADHERED TO.

THE COURIER PRINTING & PUBLISHING COMPANY V.
CHARLES F. WILSON.

FILED JUNE 4, 1902. No. 11,719.

Commissioner's opinion. Department No. 3.

1. **Work and Labor: SUFFICIENCY OF EVIDENCE.** Evidence examined, and held to support the verdict of the jury.
2. **Trial: MISCONDUCT OF COUNSEL: APPEAL AND ERROR.** If counsel, against objection, persevere in arguing to the jury upon pertinent

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facts not before the jury and expressly excluded by the court, this, on exception duly taken, may be ground for a new trial, or for a reversal.

ERROR from the district court for Lancaster county.
Tried below before CORNISH, J. *Reversed.*

J. A. Brown, for plaintiff in error.

Frank J. Kelley, *contra.*

DUFFIE, C.

The defendant in error commenced this action to recover from the plaintiff in error the reasonable value of his services for work performed as a printer and type-setter during the month of June, 1899. It is alleged that the services were reasonably worth the sum of twenty-five cents per hour, and a recovery is asked on that basis. The answer alleges that the plaintiff and defendant are each members of the Lincoln Typographical Union No. 209; that in becoming members of said union each agreed to abide by the scale of prices to be paid for type-setting as fixed by said union; that said union had fixed a scale of prices to be paid for type-setting; that said scale of prices provides that compositors of weekly newspapers shall receive twenty-five cents per 1,000 ems of type set; that the work done by plaintiff for defendant was on defendant's weekly newspaper and amounted to not more than 10,400 ems, for which plaintiff was entitled to receive the sum of \$2.60; that at the time said work and labor was performed no agreement or contract was had or existed between said plaintiff and defendant for the payment of any specific sum for said labor other than the scale of prices fixed by said union as aforesaid and the customary wages paid for such work and labor in said city of Lincoln; that the customary wages paid compositors in said city of Lincoln is twenty-five cents per 1,000 ems and no more. A tender of the amount due plaintiff based upon the union scale is plead and the amount was brought into court for the use of the defendant. A verdict was returned by the jury in

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favor of the plaintiff, upon which judgment was entered, and the plaintiff in error has brought the case here for review.

The plaintiff in error complains of the fourth instruction of the court as follows: "4th. The defendant in its answer, among other things, makes the allegation regarding their being members of the Lincoln Typographical Union. You are instructed as a matter of law concerning this, that their membership in the Typographical Union would not amount to a contract or agreement between the parties such as would entitle either to insist upon a scale of prices fixed by the Typographical Union."

Under the pleadings in this case we are inclined to think that there was no error in this instruction. It may be true, although we do not decide the question, that where an employer and an employee are both members of a union and are known to each other as members, and the union has fixed a scale of prices to be paid by the employer and to be received by the employee, that work performed by one for the other under such circumstances might be governed by the union scale. In the present case, however, while the answer alleges that both parties were members of the union, it is not alleged or shown that they were known to each other as members of the union or that the contract of employment was to be governed by such relation. The simple fact that both parties were members of the union would not of itself incorporate into their contract of employment an agreement to be governed by the union scale in relation to the wages to be paid. The plaintiff in error insists that the verdict is not supported by the evidence. We do not think that under the circumstances of this case, and in so simple a matter as the one in dispute, that we can say that the verdict should be set aside as being without support in the evidence. The plaintiff testified that he worked for the defendant more than one day, and while he further testified that "the exact number of hours figures up to something like \$3.05 at twenty-five cents an hour," this statement, in the nature of a conclu-

sion, could be eliminated from the record and sufficient still be left to sustain the verdict.

Another matter complained of by the plaintiff in error is misconduct on the part of the attorney conducting the case for the defendant in error. During the examination of the plaintiff below his attorney sought to elicit the fact that he had worked for the defendant on former occasions and the price that he had been paid for such work. Objection was made to this line of evidence and was sustained by the court. The fact of former employment and the wages paid for such services could throw no light upon the reasonable value of the work performed by the plaintiff below which this action was brought to recover. The attorney was quite insistent upon getting this evidence into the record, but on each offer of such evidence it was refused by the court. During the cross-examination of one of the defendant's witnesses the attorney made an offer to prove by the witness that the plaintiff had been hired on three or four prior occasions and had been paid at the rate of twenty-five cents per hour for the time so employed, and an objection to this evidence was sustained. In his argument to the jury the attorney, referring to this matter, said: "If it was a fact and would not hurt them, why object to it; object to showing that they had been paying this man at a higher price, and he never went to work under such a statement as that statement. They know and we know that he had been working at a higher price. This don't state the price at which he was to work at all; it simply states the price should not be less than twenty-five cents per 1,000 ems. (Referring to the union scale.) They don't dispute he worked that number of hours, but they have succeeded in convincing this court that that is incompetent testimony."

Objection was made to this line of argument, and the court, addressing the attorney, said: "The remark that you made that they knew and you knew, was improper, and the jury are instructed not to regard it. Now Mr. ———, try in the future to refrain from all remarks not reflected by the testimony."

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Continuing his argument the attorney said: "Now I am informed by the court not to refer to that testimony, and I will not do so, but this is the fact, that when this evidence is offered and tendered they object to it. Now that is before you, that you see, and you can leave it that way and arrive at your own conclusions as to the motive. The purpose of the parties who testified and the parties to the suit, that is what I am urging. I recognize the fact that when testimony is not here it is not to be considered, and you are not to consider the fact, whether it is a fact or not, that he did work for them at a higher price, but they stood here and objected to the testimony and if it wasn't true it would not hurt them, but they did object to it and convinced the court that it is not proper under the pleadings in this case. They propose to show that they will dictate the terms. Of course the amount due is a small thing; I would not have brought the suit, but it is here, and if it is a small thing why are they following it and chasing it for a few cents? Now they admit that he worked the number of hours he claims; why? Because they don't deny it. And they admit that the wages by the hour is twenty-five cents as he stated and this (referring to the union scale) shows that 26 6-19 cents is what he ought to get, and still they are chasing this for the purpose of avoiding the costs and putting them on this poor man who is poor and unable to pay. It is a small thing for a newspaper to do, force him into court and then try to force him to pay the costs."

As before stated, the attorney made repeated attempts both on the examination of his own witness and the cross-examination of the witnesses for the defendant, to show the fact of prior employment and the price paid. The court excluded this evidence. Counsel should have submitted to this ruling. If it was error he had his remedy. It was not only the right but the duty of the defendant below to object to the introduction of incompetent or immaterial evidence. The fact that it made such objection should not weigh against it, and especially should counsel refrain

from questioning the ruling of the court or seeking to gain an advantage from the jury because of such ruling. When objection was made to this line of argument and the court interfered to prevent it, while apparently acquiescent in the ruling of the court, the attorney immediately took up the question in a more aggravated form and in a manner which gave the jury to understand that the defense was not made in good faith but for the purpose of mulcting the plaintiff in costs which he was not able to pay. We cannot better express our views of such a proceeding than by quoting from the opinion of Judge Ryan in *Brown v. Swineford*, 44 Wis., 282:

"Doubtless the circuit court can, as it did in this case, charge the jury to disregard all statements of facts not in evidence. But it is not so certain that a jury will do so. Verdicts are too often found against evidence and without evidence, to warrant so great a reliance on the discrimination of juries. And, without notes of the evidence, it may be often difficult for the jury to discriminate between the statements of fact by counsel, following the evidence and outside of it. It is sufficient that the extra-professional statements of counsel may gravely prejudice the jury and affect a verdict.

"It is the duty of counsel to make the most of the case which his client is able to give him; but counsel is out of his duty and his right, and outside of the principle and object of his profession, when he travels out of his client's case and assumes to supply its deficiencies. Therefore it is that the nice sense of the profession regards with such distrust and aversion the testimony of a lawyer in favor of his client. It is the duty and right of counsel to indulge in all fair argument in favor of the right of his client; but he is outside of his duty and his right when he appeals to prejudice irrelevant to the case. Properly, prejudice has no more sanction at the bar than on the bench. But an advocate may make himself the *alter ego* of his client, and indulge in prejudice in his favor. He may even share his client's prejudices against his adversary, as far as they

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rest on the facts in his case. But he has neither duty nor right to appeal to prejudices, just or unjust, against his adversary, *dehors* the very case he has to try. The very fullest freedom of speech within the duty of his profession should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof. It may sometimes be a very difficult and delicate duty to confine counsel to a legitimate course of argument. But, like other difficult and delicate duties, it must be performed by those upon whom the law imposes it. It is the duty of circuit courts, in jury trials, to interfere in all proper cases of their own motion. This is due to truth and justice. And if counsel persevere in arguing upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, exception may be taken by the other side, which may be good ground for a new trial, or for a reversal in this court."

We recommend that the judgment of the district court be reversed and the case remanded for further proceedings according to law.

AMES and ALBERT, CC., concur.

REVERSED AND REMANDED.

MARTHA E. STEWART, APPELLEE, V. JOSEPH S. HOAGLAND
ET AL., APPELLANTS.

FILED JUNE 4, 1902. No. 11,741.

Commissioner's opinion. Department No. 3.

Mortgage Foreclosure: SUFFICIENCY OF EVIDENCE. Evidence examined, and found insufficient to sustain the findings and decree of the trial court.

APPEAL from the district court for Logan county.
Tried below before GRIMES, J. *Reversed.*

Stewart v. Hoagland.

W. V. Hoagland, for appellants.

J. E. Morrison, *contra*.

ALBERT, C.

This cause was submitted upon a brief and oral argument on behalf of the plaintiffs in error alone. The defendant in error is in default in this court. It is an action to foreclose a mortgage upon real property lying in Logan county in this state. The petition is in the usual form in such cases, and the answer is a general denial. The entire evidence preserved in the bill of exceptions is: first a deposition by the plaintiff as follows:

Q. Now, Mrs. Stewart, you may state your name, age and place of residence.

A. Martha E. Stewart, Lincoln, Nebraska. Fifty years old.

Q. Are you the plaintiff in an action now pending in the district court for Logan county, Nebraska, wherein Martha E. Stewart is plaintiff and Joseph S. Hoagland and Maria L. Hoagland are defendants?

A. Yes, sir.

Q. Are you the owner of the notes and mortgage described in the amended petition filed in that case?

A. Yes.

Q. How and when did you become the owner of them?

A. I purchased them for a valuable consideration of Mr. E. R. Smith, who on the 16th day of August, 1892, delivered them to me and executed and delivered to me at the same time a written assignment of the same, which was duly recorded in the office of the county clerk of Logan county, Nebraska.

Q. How much of the debt evidenced by said note and secured by said mortgage has been paid?

A. One interest coupon note, which fell due August first, 1893, has been paid, and that is all. The principal note and four interest coupon notes are still wholly unpaid.

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Q. Has any action at law been commenced to recover the debt evidenced by said notes and secured by said mortgage?

A. No.

Second, the testimony, as a witness, of Mr. J. E. Morrison, the attorney of the plaintiff, as follows:

"My name is J. E. Morrison, and my residence is Gandy, Nebraska. My occupation is that of an attorney. I am attorney for the plaintiff, Martha E. Stewart. At the last term of this court, September 14, 1899, I had in my possession the principal note and coupons signed by Jos. S. Hoagland and Maria L. Hoagland, the defendants in this case; they are now lost. I have made diligent search in my office in all places where I keep my private papers and am not able to find either the principal note or coupons. The plaintiff now offers in evidence true copies of the lost coupons and principal note sued on in this case, which are attached to the petition in this case. The same being a part of the files are not given to the reporter.

"The defendants object as incompetent, immaterial and irrelevant, and not properly identified, and not sufficient showing of lost instruments."

Q. (Court.) How do you know these are copies?

A. I copied them myself.

Q. (Court.) What did you copy them from?

A. I copied them from the originals.

Q. Where were the originals at the time you made the copies?

A. They were in my possession in my office.

From a decree of foreclosure as prayed, the defendants appeal to this court. A motion to strike the deposition from the files was denied and is sought to be insisted upon here, but this court can not determine as to the correctness of the ruling upon appeal. If it was desired to have it reviewed the case should have been brought up by petition in error. The sole question presented is, whether there is sufficient evidence in the record to sustain the decree. Very clearly there is not. No attempt was made to prove

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the execution or delivery of the alleged mortgage, which was not offered in evidence, or of the notes of which copies were, apparently, produced and offered in evidence, but which are not found in the bill of exceptions. Every material allegation of the petition was put in issue by the answer. Certainly nothing could be more material than the matters just mentioned. Upon this record the only judgment the district court could properly have rendered is one of dismissal. By section 594 of the Code, this court is directed "to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment."

It is therefore recommended that the judgment of the district court be reversed and the cause remanded.

AMES and DUFFIE, CC., concur.

REVERSED AND REMANDED.

J. A. LOWRY V. ELIZABETH ROBINSON.

FILED JUNE 4, 1902. No. 11,743.

Commissioner's opinion. Department No. 1.

1. **Vendor and Purchaser: RESCINDING BY VENDOR: RETURN OF PAYMENTS: INTEREST.** Where a contract of sale and purchase of land is rescinded by the vendor, the vendee is ordinarily entitled to repayment of the part purchase money paid by him with interest.
2. **Vendor and Purchaser: RESCINDING BY AGREEMENT: RETURN OF PAYMENTS.** Where, however, the rescission occurs by virtue of a written contract or agreement between the parties, setting out the terms and conditions upon which the contract of sale and purchase shall be rescinded, and no claim with respect to what has been paid by the vendee is reserved therein, the vendee can not recover.
3. **Pleading: RECOVERY OF PAYMENTS ON CONTRACT OF SALE: PETITION: SUFFICIENCY.** Petition examined, and *held* not to state a cause of action.

ERROR from the district court for Hall county. Tried below before THOMPSON, J. *Affirmed.*

Lowry v. Robinson.

Harrison & Pearne, for plaintiff in error.*O. A. Abbott*, contra.

KIRKPATRICK, C.

This is an action brought in the county court for Hall county by plaintiff in error against defendant in error to recover the sum of \$590.10, being a \$500 cash payment, and two interest payments of \$19.50 and \$39.10, paid by plaintiff to defendant on a contract for the purchase and sale of certain lands in Hall county. A general demurrer was interposed to the petition on the ground that it failed to state facts sufficient to entitle plaintiff to any relief. The demurrer was by the county court sustained, and error prosecuted by plaintiff to the district court, where the judgment of the county court was sustained and the action dismissed. The cause is brought to this court by plaintiff upon petition in error.

The only question presented is the correctness of the rulings of the county and district courts in sustaining the demurrer and dismissing the action. The petition sets out that on the 27th day of July, 1897, plaintiff entered into a contract with defendant by which he purchased from her the south half of the southeast quarter, north half of the southwest quarter, and the southeast quarter of the southwest quarter of section 18, township 11, north of range 11 west, in Hall county; that plaintiff paid on said contract the sum of \$500 in cash, and executed two promissory notes, one for \$2,000 due on the 27th day of March, 1898, and one for \$1,200 due on the 27th day of July, 1900. Under the terms of said agreement, plaintiff thereafter, on the 30th day of August, 1897, paid as interest upon a certain mortgage named in the contract the sum of \$19.50, and on the second day of March, 1898, the sum of \$39.10; that defendant retained possession of the premises and planted and harvested the crops grown thereon in the year 1897, and that plaintiff was given permission to occupy a portion of the house and barn on the premises at an agreed

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rental of \$5 per month, and that plaintiff had permission to turn some of his stock into the pasture on the premises. Plaintiff further alleged that he had expended for lumber in erecting a granary on the place the sum of \$21.50, and that he had repaired fences on the premises at his expense in the sum of \$10; that on the 27th day of March, 1897, being unable to meet the first note due for \$2,000, plaintiff applied to defendant for an extension of time for payment, which, after some consideration, defendant refused to grant, and that by agreement of parties on the 23d day of April, 1898, the contract was canceled in writing, a copy of the instrument cancelling the contract being attached to the petition, and made a part thereof as an exhibit. It was further alleged that the bond for a deed and the promissory notes were surrendered by the parties holding them respectively.

Plaintiff's contention is that the fact of the cancellation of the contract for sale and purchase is in itself sufficient to authorize plaintiff to recover the purchase money paid. The rule seems reasonable and settled upon authority that where a contract of sale and purchase has been rescinded, the vendor can not thereafter retain the part payment of purchase money which he may have received. The vendee is entitled to repayment of the purchase money subject to any recoupment for damages due the vendor provided the rescission of the contract was on account of the failure of the vendee to comply with its terms. It is probably likewise true that where the contract is rescinded by mutual consent, the vendee is entitled to a like repayment of the purchase money paid. *Eaton v. Redick*, 1 Neb., 305; *Shirley v. Semi-Tropic Land & Water Co.*, 33 Pac. Rep. [Cal.], 848; *Cleary v. Folger*, 24 Pac. Rep. [Cal.], 280; *Evans v. Bently*, 29 S. W. Rep. [Tex.], 497.

But the general rule is subject to the contract or agreement of the parties in making the rescission. In the case at bar, the memorandum of agreement entered into between the parties rescinding the contract, and which is set out and made a part of plaintiff's petition, is in the

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following language: "April 23, 1898. The contract between Elizabeth Robinson and J. A. Lowry for the sale and purchase of part of section 18, township 11 north of range 11 west, is this day canceled by mutual consent on the following conditions, to-wit: The notes given under said contract to be surrendered, Lowry to surrender possession on or before May 9, 1898, said Lowry to remove the barn erected on part of S. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$ of said section 18, within one year from this date, and is to pay for the use of the ground at the rate of \$5 per year. (Signed.) Elizabeth Robinson. J. A. Lowry. Witness: O. A. Abbott."

It seems apparent from the wording of this memorandum that it was intended to contain the entire agreement of the parties. It recites that the contract is this day canceled by mutual consent on the following conditions, to wit: It then proceeds to give the conditions agreed upon by the parties. We are of opinion that the contract, setting out the conditions of the rescission or cancellation, as it does, necessarily excludes other conditions, and that as it does not provide for repayment of any part of the purchase money paid, it must be held that the parties did not intend or understand that there should be a repayment. No fraud or mistake is alleged in the making of the memorandum of cancellation, and plaintiff can not now be heard to say that the contract was canceled upon other or different conditions than those set out in the writing signed. *Tice v. Zinsser*, 76 N. Y., 549.

The petition fails to state facts entitling plaintiff to any relief, and the judgments of the county and district courts in so holding should be affirmed. It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

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ROBERT M. ZUG, APPELLEE, v. ROBERT L. FORGAN ET AL., IM-
PLEADED WITH A. SCHUYLER, APPELLANT, ET AL.

FILED JUNE 4, 1902. No. 11,785.

Commissioner's opinion. Department No. 1.

1. **Pleading:** OBJECTION TO PETITION AFTER TRIAL BEGUN. Petition examined, and *held* sufficient to withstand an objection raised after trial begun.
2. **Courts:** JUDICIAL NOTICE OF THEIR OWN RECORDS AND SIGNATURES. Courts will take judicial notice of the genuineness of their own records and the signatures of their own officers.
3. **Execution:** SUFFICIENCY OF RETURN AS EVIDENCE IN EQUITY. Return of the sheriff of *nulla bona* to an execution issued upon a judgment at law received in evidence, *held*, sufficient, under the provisions of section 851 of the Code of Civil Procedure, to authorize the court to proceed in the equity cause.

APPEAL from the district court for Douglas county.
Tried below before JESSEN, J. *Affirmed.*

William A. De Bord, for appellant.

Tibbets Bros., Morey & Anderson, contra.

KIRKPATRICK, C.

This is an appeal from a decree of foreclosure entered by the district court for Douglas county. Appellant contends that the trial court erred in entering the decree for the following reasons: (1) that the petition failed to state facts sufficient to entitle appellee to any relief; (2) that no proof was offered showing that an execution had been issued upon the judgment at law which had theretofore been obtained on the same indebtedness and returned unsatisfied; (3) that the return of the sheriff was not sufficient under the provisions of section 851 of the Code of Civil Procedure. These objections will be examined in the order stated.

It is disclosed by the record that the judgment at law had been entered in the county court upon the note sued

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upon, which judgment had been transcribed to the district court for Douglas county; that the judgment had been entered prior to the commencement of the foreclosure proceedings. That portion of the petition to which the objection is directed is as follows: "That on the 23d day of November, 1897, a suit was begun against said defendant, Robert L. Forgan, in the county court of Douglas county, Nebraska, to recover the amount due upon said note; that on the 10th day of June, 1898, a judgment was rendered against said defendant in said action for the sum of nine hundred forty-four and 62-100 (\$944.62) dollars and interest thereon at ten per cent. from the date of said judgment. That a transcript of said judgment was duly filed in the district court for Douglas county, Nebraska, and an execution was issued out of said court upon said judgment on or about July 28, 1899, which execution has been returned by the sheriff of said county with the following indorsement:

" 'STATE OF NEBRASKA, }
COUNTY OF DOUGLAS, } ss.

" 'Received this writ on the 28th day of July, 1899, and the same is hereby returned not satisfied, as after diligent search no goods and chattels or lands and tenements of the within named Robert L. Forgan, defendant, are found in Douglas county, Nebraska, upon which to levy and collect the within judgment. John W. McDonald, Sheriff. By Geo. W. Hill, Deputy.' " In other respects the petition was in the ordinary form for the foreclosure of a mortgage.

No objection was made to the sufficiency of the petition by motion or demurrer, but on the trial a demurrer *ore tenus* to the introduction of evidence was interposed, which was overruled. Section 851 of the Code of Civil Procedure, upon which the objection urged against the sufficiency of the petition is based, is as follows: "If it appear that any judgment has been obtained in a suit at law for the money demanded by such petition, or any part thereof, no proceedings shall be had in such case, unless, to an execution against the property of the defendant in such

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judgment, the sheriff or other proper officer shall have returned that the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy such execution except the mortgaged premises."

The established rule in this state is that upon objections to the introduction of testimony on the ground that the petition fails to state a cause of action, the pleading will be liberally construed to sustain it if possible. *Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb., 167. Measured by this rule, we are of opinion that the allegation of the petition was sufficient. The pleading is not in good form, and had the attention of the trial court been called thereto by motion, no doubt it would have required its amendment. This was not done, and we are of opinion that the trial court did not err in admitting evidence.

It is next contended that there is no proof that an execution was ever issued upon the judgment at law. This contention can not be sustained. It is disclosed by the evidence, admitted without objection, that the judgment at law was entered of record on execution docket No. 4., of the district court for Douglas county, at page 201. The deputy sheriff was called as a witness, and identified the execution which was offered in evidence, to which appellant objected as being immaterial, irrelevant and no foundation laid for its introduction. The first two grounds of the objection are clearly without any merit. As to the third, it may be said that it is not clear what point appellant intended to present to the court for consideration by this objection. It is urged in the briefs that no testimony was offered showing that it was one of the records of the court, or that it was one of the files in the particular case. The rule is settled that a court will take judicial notice of the genuineness of its own records and of the signatures of its own officers. *State v. Postlewait*, 14 Ia., 446; *State v. Schilling*, 14 Ia., 455. The execution shown by the record speaks for itself. It shows that it was issued in the case found on page 201 of execution docket No. 4; it is signed by the clerk of the district court and

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issued under his seal; it shows on the back thereof the return of the sheriff which had been properly identified and proven. The testimony of the deputy sheriff, together with the notice that the court will take judicial notice of its own records and the signatures of its own officers, was certainly sufficient to entitle the execution and its return to be admitted in evidence. There is probably no doubt that the return offered and received carries with it as a part thereof the filing mark of the clerk of the district court, showing when it was returned and filed. In the case of *Commonwealth v. Snowden*, 1 Brewst. [Pa.], 218, it was said that the court will take judicial notice of the indorsement by its clerk showing the date of filing of a complaint. The second objection seems not to be well taken.

The third objection is that the return of the sheriff is not in accordance with section 851 of the Code of Civil Procedure above quoted. The return of the sheriff seems to be sufficient to withstand an attack in a collateral proceeding, and while it might have been made more specific, it is clearly sufficient to authorize the court to proceed in the equity cause. It is clear that the purpose of the statute is that the trial court, before proceeding with the equity cause, must be satisfied that the proceedings at law terminated, after execution issued upon the judgment entered therein, without property being found to satisfy the debt or part thereof. We are of opinion that the execution together with the return of the sheriff thereon was fully sufficient to satisfy the trial court that appellee had realized nothing in his proceedings at law. There seems to be no error in the proceedings of the trial court, and it is therefore recommended that the judgment of the district court be in all respects affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

Irwin v. Gay.

ANNA M. IRWIN ET AL. V. GEORGE W. GAY ET AL.

FILED JUNE 4, 1902. No. 11,796.

Commissioner's opinion. Department No. 2.

1. **Mortgage Foreclosure: DISMISSAL IN U. S. COURT FOR LACK OF JURISDICTION: SUBSEQUENT ACTION IN STATE COURT.** Where a suit to foreclose a real estate mortgage is instituted in the circuit court of the United States and such cause is dismissed from said court for want of jurisdiction, the record of such dismissal is not a bar to a subsequent action between the same parties on the same mortgage in a state court having competent jurisdiction.
2. **Homestead: MORTGAGE FOR PURCHASE PRICE: WHO MUST SIGN.** When a mortgage is given to secure part payment of the purchase price of a homestead to be established, it is unnecessary that such mortgage be signed and executed by both husband and wife; only the one taking the title need execute such mortgage.
3. **Homestead: MORTGAGE FOR PURCHASE PRICE: EXTENSION OF TIME: WHO MUST SIGN.** The same rule governs with reference to an agreement for the extension of a mortgage given for such a consideration.

ERROR from the district court for Lancaster county.
Tried below before FROST, J. *Affirmed.*

Willard E. Stewart, for plaintiffs in error.

Owsley Wilson, *contra.*

OLDHAM, C.

This was an action to foreclose a real estate mortgage on a city lot situated in Lincoln, Nebraska. The mortgage was originally executed and delivered to the Ballou State Banking Company on April 16, 1889, by John R. Megahan and wife, to secure an indebtedness therein described. On April 29, 1891, Megahan and wife conveyed said property to Alonzo J. Wright, and on June 21, 1892, Wright and wife sold and conveyed the mortgaged property to defendant, Anna M. Irwin, by deed of warranty, by the terms of which she assumed and agreed to pay the mortgage in controversy as a part of the purchase price of the prem-

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ises. The note and mortgage were sold, assigned and delivered to plaintiff, Geo. W. Gay, by the Ballou State Banking Company on May 9, 1889. On the 5th day of February, 1895, an agreement was entered into by the plaintiff, Geo. W. Gay, for an extension of the time of the payment of the principal sum of this mortgage until April 1, 1898, in consideration of the prompt payment by the defendant, Anna M. Irwin, of six semi-annual interest coupons executed by her and delivered to plaintiff in consideration of such extension agreement.

There were two defenses interposed at the trial of the cause in the court below. One was that a suit on this mortgage had been instituted by plaintiff in the circuit court of the United States, district of Nebraska, prior to the beginning of this cause of action for the foreclosure of this mortgage and that a judgment of dismissal had been entered by said court, and that said judgment is a bar to this action; the other defense interposed was that the property in dispute is occupied by the defendants, Anna M. Irwin and B. H. Irwin, husband and wife, as a homestead, and that the husband did not join with the wife in an agreement for the extension of the mortgage in controversy, and that such agreement was void as an attempted alienation of the homestead in which the husband did not join. The court below found the issues in favor of the plaintiff and defendants bring error to this court.

With reference to the first defense interposed, it is sufficient to say that the record of the proceedings of this cause which had been instituted in the circuit court of the United States shows that the action was dismissed in that court for want of jurisdiction, consequently there was no adjudication of the rights of the parties in that tribunal, and the dismissal of the cause by that court is no bar to an action between the same parties on the same mortgage in a court of competent jurisdiction.

With reference to the other defense interposed, it need only be said that when a mortgage is given to secure part of the purchase price of a homestead to be established, it

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is unnecessary that such mortgage be signed and executed by both husband and wife—only the one taking the title need execute such mortgage; and the same principle governs with reference to an agreement for the extension of a mortgage given for such a consideration. *Prout v. Burke*, 51 Neb., 24, 70 N. W. Rep., 512; *Jackson v. Phillips*, 57 Neb., 193, 77 N. W. Rep., 683; *Christy v. Dyer*, 14 Ia., 438.

The reason of this rule is stated by Waples in his work on Homestead and Exemption, section 7, page 353, to be "that the wife's security of the home is not affected by such a transaction. She has no right to it till the home is paid for; and what goes to pay does her no wrong."

We are therefore of the opinion that the judgment of the trial court was right and should be affirmed, and we so recommend.

BARNES and POUND, CC., concur.

AFFIRMED.

THE UNION TRUST COMPANY OF NEW YORK, APPELLEE, v.
EMILY R. KING ET AL., IMPLEADED WITH GEORGE W.
GREENWALT ET AL., APPELLANTS, ET AL.

FILED JUNE 4, 1902. No. 11,884.

Commissioner's opinion. Department No. 1.

1. **Mortgage Foreclosure: APPRAISAL BY DEPUTY SHERIFF.** A deputy sheriff may act for and in the place of the sheriff in making an appraisal of real estate for the purpose of a judicial sale in the execution of a decree of court.
2. **Mortgage Foreclosure: APPRAISAL MADE BY SHERIFF: PRESUMPTIONS.** All presumptions will be indulged in favor of the fairness of an appraisement made by a sheriff.
3. **Mortgage Foreclosure: APPRAISAL: DESIGNATION OF NAMES AS ET AL.** An appraisal of the interests, in land about to be sold at judicial sale, of the parties to an action, against whom the decree operates, is not invalidated because the names of the owners of the equity of redemption are not stated other than by the designation "et al." after the name of the principal defendant in the action. *Wells v. Frazier*, 64 Neb., 370, 89 N. W. Rep., 1033, followed.

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APPEAL from the district court for Custer county.
Tried below before SULLIVAN, J. *Affirmed.*

J. R. Deane, for appellants.

Montgomery & Hall, contra.

DAY, C.

This is an appeal from the confirmation of a sale made in pursuance of a decree of mortgage foreclosure. It is urged as an objection to the sale that the appraisement was made and conducted by the deputy sheriff instead of the sheriff. It is now the settled rule in this state that a deputy sheriff may act for and in the place of the sheriff in making an appraisal of real estate for the purpose of a judicial sale in the execution of a decree of court. *Wells v. Frazier*, 64 Neb., 370, 89 N. W. Rep. 1033; *Richardson v. Hahn*, 63 Neb., 294, 88 N. W. Rep., 527, and authorities there cited.

It is also urged that the appraisement is too low. No evidence is preserved in the record in support of this objection. It therefore must be presumed that the appraisers did their duty. In *De Groot v. Wilson*, 63 Neb., 423, 88 N. W. Rep., 657, it is held that "All presumptions will be indulged in favor of the fairness of an appraisement made by a sheriff."

It is next urged that because in the appraisal the parties are designated as Emily R. King et al., without naming the defendant who appeals, that therefore the proceedings are thus rendered so irregular as to amount to prejudicial error. This identical question was before this court in *Wells v. Frazier*, 64 Neb., 370, 89 N. W. Rep., 1033, wherein it is said: "We know of no legal ground of complaint because they were not specially singled out from the numerous defendants, and found to have an interest in the land as owners. It is obvious that they were in no way prejudiced by the appraisers not undertaking to ascertain and separate the interests of the different de-

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fendants against whom the decree operated. It is not required of the appraisers that they should ascertain and determine what the respective interests of the different defendants were in the land being appraised for sale. By finding the gross value of the land, and deducting therefrom the prior incumbrances, the value remaining represented the value of the interests, for the purpose of the sale, of either or all of those against whom the decree and its execution operated. *Toscan v. Devries*, 57 Neb., 276, 77 N. W. Rep., 669."

We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

HERMAN G. WEILAGE V. LYSLE I. ABBOTT ET AL.

FILED JUNE 4, 1902. No. 11,887.

90 NW 1128
Commissioner's opinion. Department No. 2.

1. **Costs and Attorneys' Fees:** AGREEMENT TO PAY: DISCONTINUANCE OF CAUSE: CONSIDERATION. Discontinuance of a pending cause and agreement not to prosecute any further claim are sufficient consideration for a promise to pay accrued costs and attorneys' fees.
2. **Frauds, Statute of:** AGREEMENT TO PAY ATTORNEYS' FEES. In such case the agreement to pay attorneys' fees is an original and independent contract and is not within the statute of frauds as being a promise to answer for the debt of another.

ERROR from the district court for Douglas county.
Tried below before ESTELLE, J. *Affirmed.*

John O. Yeiser, for plaintiff in error.

Lysle I. Abbott and Ezra S. Abbott, contra.

POUND, C.

The sole question involved in this case is whether the petition states a cause of action. The allegations are, in

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substance, that plaintiffs as attorneys at law had undertaken to prosecute a claim against defendant in behalf of one George G. Weilage upon a contingent fee; that pending proceedings thereon the claim was settled by the parties without the knowledge or consent of plaintiffs, the defendant agreeing to pay the costs and plaintiffs' fees as attorneys, and said George Weilage discontinuing the case and agreeing to "abate all further claim." Objection is made that there was no consideration for the agreement to pay attorneys' fees and that such agreement is within the statute of frauds as a promise to answer for the debt of another. Neither point is well taken. Counsel argues that because it is alleged that an agreement was entered into whereby defendant was to pay the claim in one year, giving security therefor, George G. Weilage had no claim to prosecute and his agreement not to proceed further was no consideration. But the fair construction of the petition is that said agreement was superseded by a new arrangement, the terms of which have been stated already. If anything else is meant, it would be that the agreement to pay the claim in a year was a part of the whole settlement. In either event the consideration is ample. The promise not to prosecute further and the discontinuance would support not only an agreement to pay the claim at a future date but also a promise to pay the costs and attorneys' fees. As to the other point, there was obviously an original and independent contract not within the statute. *Fitzgerald v. Morrissey*, 14 Neb., 198; *Palmer v. Witcherly*, 15 Neb., 98; *Swayne v. Hill*, 59 Neb., 652.

We recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

McIntyre v. Malone.

ALEXANDER MCINTYRE, RECEIVER OF THE BANKING FIRM
OF C. A. SWEET & COMPANY, ET AL., APPELLATES, V.
MICHAEL MALONE ET AL., APPELLANTS.

FILED JUNE 4, 1902. No. 11,907.

Commissioner's opinion. Department No. 3.

1. **Action: STAY IN STATE COURT: BANKRUPTCY: DISCHARGE A RELEASE OF CLAIM.** The state court should stay proceedings in a suit pending against a person against whom proceedings in bankruptcy have been commenced, either on his own petition or by his creditors, if the pending suit is founded upon a claim from which a discharge in bankruptcy would be a release.
2. **Action in State Court: BANKRUPTCY: APPLICATION FOR STAY IN STATE COURT.** The state court in which the suit is pending is the proper tribunal to which application for a stay should be made. *In re Geister*, 97 Fed. Rep., 322.
3. **Bankruptcy: ACTIONS BY TRUSTEE IN STATE COURTS.** Actions by a trustee in bankruptcy to recover property in the hands of third parties and which he claims as a part of the bankrupt estate, must be prosecuted in the state court unless the defendants in such actions consent that the same may be prosecuted in the federal court. *Bardes v. Hawarden Bank*, 178 U. S., 525.
4. **Pleading: ACTION TO SET ASIDE CONVEYANCE: ALLEGATION IN PETITION OF INTENT TO DEFRAUD.** In an action brought to set aside a conveyance of land and subject the same to the payment of the plaintiff's judgment, the petition sufficiently states a cause of action if it alleges that the conveyance was made for the purpose and with the intent to defraud creditors.

APPEAL from the district court for Otoe county. Tried below before JESSEN, J. *Affirmed.*

Hazlett & Jack, John C. Watson and John V. Morgan,
for appellants.

E. F. Warren and L. F. Jackson, contra.

DUFFIE, C.

The principal question in this case is the right of a trustee in bankruptcy to prosecute an action in the courts of the state to recover property alleged to have been fraudulently conveyed by the bankrupt.

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On the 8th of February, 1897, C. A. Sweet & Co., being judgment creditors of Michael Malone, commenced an action to subject certain property in Otoe county standing in the name of Nora Malone, the wife of said Michael, to the payment of their judgment. Some time after the commencement of this action Alexander McIntyre was appointed receiver for Sweet & Co. and was substituted as plaintiff in the action. While the action was pending, and on the 17th of March, 1900, Michael Malone filed his voluntary petition in bankruptcy in the district court of the United States for the district of Nebraska, and thereupon was duly adjudged a bankrupt, and Jackson Farley appointed trustee. May 26, 1900, Farley, as trustee, moved and obtained leave to intervene in the action, after which a trial of the case was had and a decree entered in favor of the plaintiffs. Prior to the trial the defendants asked leave to file an amended answer setting up the bankruptcy proceedings in the case of Michael Malone pending in the district court of the United States, but the court refused to allow this answer to be filed. It is now insisted with great earnestness that the court should have allowed the answer and have stayed proceedings in the case.

Section 11 of the bankruptcy act of 1898 provides as follows: "A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined." Had the trustee in bankruptcy not intervened in this action there can be no question that the district court should have allowed the proposed answer to be filed and have stayed proceedings in the case.

In *Hill v. Harding*, 107 U. S., 631, the supreme court of

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the United States, in construing a substantially similar section found in the act of 1867, said: "The terms of this enactment are as broad and as peremptory as possible. 'No creditor whose debt is provable shall be allowed to prosecute to final judgment' any suit thereon against the bankrupt; and such suit 'shall, upon the application of the bankrupt, be stayed.' This provision, like all laws of the United States made in pursuance of the constitution, binds the courts of each state, as well as those of the nation. Upon the application of the bankrupt to the court, state or national, in which the suit is pending, it is the duty of that court to stay the proceedings 'to await the determination of the court in bankruptcy on the question of the discharge,' unless there is an unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge."

Prior to the offer of this answer the trustee in bankruptcy had intervened in the action and was prosecuting the suit. Section 70 of the bankruptcy act provides, among other things, that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value."

There can be no dispute that under this provision of the act it was not only the right but the duty of the trustee in bankruptcy to prosecute this action and to establish if he could the fraudulent character of the transfer of this property from Michael Malone to his wife Nora, and the question of whether such an action might be prosecuted in the state court was determined by the supreme court of the United States in *Burdes v. Hawarden Bank*, 178 U. S., 525. It was there held that the United States district courts have no jurisdiction over independ-

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ent suits brought by a trustee in bankruptcy to assert title to the money or property as assets of the bankrupt against strangers to the bankruptcy proceedings unless by consent of the proposed defendants, such jurisdiction being denied to them by section 23 of the bankrupt act of 1898.

It will thus be seen that the highest court of the land, and whose decision on all questions arising under the bankrupt act is final and conclusive, has held in a case squarely presenting the question, that the trustee can not institute an action of the character of the one at bar in any court except that of the local tribunal of the state unless by the consent of the defendants in such action. Such being the case, the matters presented in the answer asked to be filed were wholly immaterial and the court was right in not allowing the record to be incumbered by such immaterial matters.

The appellants further object that the petition does not state a cause of action in that it is not alleged that at the time of the conveyance the defendant, Michael Malone, was not insolvent or did not have other property sufficient to pay the plaintiff's claim. It is also urged that the petition upon its face discloses that there is personal property belonging to Michael Malone which may be levied on and sold and that a resort to equity is not necessary. It is alleged in the petition that at the time of making a conveyance of this land Michael Malone also conveyed to his wife about \$2,000 in value of personal property and that she thereupon conveyed said personal property by chattel mortgage to the defendant, William Malone, for the sum of \$2,000, but that the mortgage was without consideration and for the purpose of hindering, delaying and defrauding C. A. Sweet & Co. and other creditors of Michael. It is urged in argument that this personal property, if the statements of the petition are true, could be taken in execution against Michael Malone and applied to the satisfaction of plaintiff's judgment. The petition in clear and unequivocal language alleges

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that execution had been issued upon this judgment prior to the commencement of this action and returned unsatisfied. This return under the authorities is conclusive.

In *McElwain v. Willis*, 9 Wend. [N. Y.], 549, in speaking of the right of the creditor to resort to equity for the enforcement of his claim, it is said: "The ground upon which the jurisdiction of the court rests in such cases is, that the legal remedy has been exhausted without satisfaction of the judgment, and certainly the best evidence of the fact is the official return of the sheriff that no goods or chattels, lands or tenements can be found, out of which he can levy the debt by virtue of the execution. Upon any other view, the question whether there was property subject to an execution or not would be open to be litigated by the parties in every proceeding of the kind in question, and to be decided by the court upon the testimony produced. The return of the officer is now considered conclusive, and if the defendant is injured by his misconduct, the law affords an ample remedy." See also *Page v. Grant*, 9 Ore., 116.

Where, as in this case, the petition alleges that the conveyance was made for the purpose and with the intent to defraud creditors, we are of the opinion that it is not necessary to allege that the fraudulent grantor did not at the time of the conveyance have other property out of which the creditor's claim might be secured.

We have been referred to several Indiana cases as authority for the proposition that the pleader must aver that at the time of the alleged fraudulent conveyance the grantor had no other property sufficient to pay his creditors.

In *Citizens' Bank of Louisiana v. Buddig*, 65 Miss., 284, the supreme court of Mississippi, referring to these cases and to the Indiana rule, remarks: "In Indiana the supreme court, confounding the distinction between a voluntary conveyance by a husband to his wife, a father to his child, and the like, the validity or invalidity of which is determinable by the circumstances of the donor at the time

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of the gift, and a conveyance made to hinder, delay and defraud creditors, has held that a creditor attacking a conveyance, as made for the purpose of defrauding, must aver and prove the insolvency of the debtor when the conveyance was made, and continued to the time of instituting the suit; and has displayed remarkable consistency and persistence in this erroneous view, against the sentiment of the bar and inferior courts, as indicated by the multitude of cases in which it has been questioned."

This criticism we think is well founded. A conveyance made to defraud creditors can not in any manner affect their rights and the property may be pursued and taken until it reaches the hands of some *bona fide* purchaser. On the other hand, a gift made by a debtor to a member of his family is fraudulent only in case he does not retain enough in his own hands to satisfy the debts existing against him at the time. A conveyance is not fraudulent simply because it is made by way of gift or advancement to a member of the grantor's family, and his creditors have no right to interfere unless the gift is disproportionate to his means and will have the effect of defeating his creditors in the collection of their claims. *Adler & Sons Clothing Co. v. Hellman*, 55 Neb., 266.

It follows, therefore, in the case of gifts, that the creditor must allege in attacking the conveyance that the grantor did not have other property sufficient to pay his debts.

We discover no error in the record and therefore recommend that the judgment appealed from be affirmed.

ALBERT and AMES, CC., concur.

AFFIRMED.

Dittman Boot & Shoe Co. v. Graff.

GEORGE F. DITTMAN BOOT AND SHOE COMPANY V. PAUL
D. GRAFF ET AL.

FILED JUNE 4, 1902. No. 11,910.

Commissioner's opinion Department No. 2.

1. **Attachment: TAKING EVIDENCE AS TO TRUTH OF AFFIDAVIT: DISCRETION OF COURT.** Where the defendant, in his motion to dissolve an attachment, denies the truth of the facts stated in the affidavit on which the attachment was obtained, the manner of taking the evidence, on the hearing of the motion, is within the discretion of the court.
2. **Attachment: EXTENT OF POWER AND AUTHORITY OF COUNTY COURT: STATUTES.** The practice in attachment cases, in the county court, where the amount involved is above the jurisdiction of a justice of the peace, by chapter 20 of the Compiled Statutes, is made the same as that which prevails in the district court, and the county court has full power to hear motions to dissolve attachments and make the proper orders thereon.
3. **Exceptions, Bill of: EVIDENCE IN ATTACHMENT WANTING: PRESUMPTIONS.** Where the evidence taken in the county court on a motion to dissolve an attachment is not preserved by a bill of exceptions, and is not before the court of review, it will be presumed that the evidence was sufficient to sustain the judgment and order of the lower court.

ERROR from the district court for Nemaha county. Tried below before STULL, J. *Affirmed.*

E. B. Quackenbush and *B. Frank Neal*, for plaintiff in error.

W. H. Kelligar and *E. Ferneau*, *contra.*

BARNES, C.

This is a proceeding in error to reverse the judgment of the district court for Nemaha county sustaining the order of the county court of that county dissolving an attachment. The record before us consists solely of the transcript of the proceedings in the district and county court, there being no bill of exceptions in the case. From the transcript it appears that on the 11th day of March, 1898,

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the George F. Dittman Boot and Shoe Company, a Missouri corporation, filed an affidavit in the county court of Nemaha county against Paul D. Graff and Charlotte Driehouse, who were described therein as partners doing a general trading and merchandising business at Johnson, Nebraska, as P. D. Graff & Co. It was alleged in the affidavit that Clement L. Wilson, as attorney for the plaintiff therein, had commenced an action against the defendants above named, Paul D. Graff and Charlotte Driehouse, partners as P. D. Graff & Co., to recover the sum of \$20.80 on a past due indebtedness, and \$708.95 money not yet due; that the whole sum was for goods sold and delivered by plaintiffs to defendants at their request, and at an agreed price; that the defendants were about to sell, convey and dispose of their property with fraudulent intent; that said defendants had assigned their said property to persons unknown to affiant with fraudulent intent to cheat and defraud their creditors, and for the purpose of hindering and delaying them in the collection of their just debts; that the claim of \$708.95 would be due on the first day of April, 1898; that such claim was just and wholly unpaid. No petition, however, was filed in the case at that time, and under the practice obtaining in the county court, in cases of that magnitude, it is doubtful if any action was commenced. Upon the affidavit thus filed an order of attachment was issued directed to the sheriff of said county, together with a summons which was returnable on the first day of the April term of the county court. So far as the record discloses no order was made in this case allowing the action to be commenced, or granting the writ of attachment; however, the writ was issued as above stated, and placed in the hands of the sheriff, who levied the same upon the property of the defendants. The summons was also served upon the defendants, to wit, P. D. Graff and Charlotte Driehouse, by giving to each of them a true and certified copy of the same with all of the indorsements thereon. On the following day Charlotte Driehouse, one of the defendants, filed a motion to dis-

charge the attachment, which contained the following grounds: first, because the facts stated in the affidavit are not sufficient to justify the issuing of the same; second, because the statement of facts in the said affidavit are untrue. Notice was given of the hearing of this motion, and on the 17th day of March the matter was taken up and heard by the county judge. On that day a petition was filed for an order of attachment, which was not sufficient in form or substance to state a cause of action in favor of the plaintiffs and against the defendants on the debt sued on, and the only prayer contained in the petition was as follows: "Wherefore plaintiff prays that a writ of attachment may issue; that the goods, wares and merchandise of the said P. D. Graff & Co., or so much thereof as will satisfy plaintiffs' demands, may be seized under the order of this court, together with a sufficient amount to pay the costs incident to this action, and that the same shall be held subject to the payment of plaintiffs' claims and demands; and that said goods be sold for the payment of plaintiffs' said claims and demands." Evidence was introduced upon the hearing of the motion to dissolve the attachment in the nature of oral testimony on both sides, and after due consideration thereof the county judge made an order dissolving the said attachment. Nothing further was ever done in the county court and no further proceedings were ever had therein. From this order the plaintiff prosecuted error to the district court. The evidence in the case not having been preserved by a bill of exceptions, the district court affirmed the order of the court below, and from such judgment of the district court the plaintiff brings the case to this court by a petition in error.

1. The plaintiff contends that the district court erred in not reversing the judgment and order of the county court, because the defendant was allowed to introduce evidence in the county court tending to show that the facts stated in the affidavit for attachment were not true. It is claimed by the plaintiff that the defendant had no

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right to introduce any evidence in relation to the facts alleged in the affidavit, for the reason that she filed no affidavit in the county court. We can not agree with plaintiff's contention on this point. When the motion to dissolve the attachment was filed, and the facts in the affidavit were denied therein, the burden of proof was on the plaintiff to sustain his allegations. He introduced his evidence for that purpose, and of course it was competent for the defendant to introduce her evidence to rebut that of the plaintiff in order that the court might be advised as to the truth or falsity of the allegations contained in the original affidavit. It seems that the court permitted the introduction of evidence on both sides of this question. It was within the discretion of the court to proceed in this manner, and there is nothing before us to show that there was any abuse of such discretion. *Kountze v. Scott*, 52 Neb., 461.

2. The plaintiff contends that the court had no power to make an order dissolving the attachment, and as a basis of such contention he claims that section 234a of the Code, which purports to give the county courts and justices of the peace authority to hear and determine motions to dissolve attachments and to make applicable to county and justice courts the provisions of sections 234, 235 and 236 of the Code of Civil Procedure is unconstitutional and void.

We decline to pass upon this question, because it does not arise in the case at bar. If the plaintiff succeeded in commencing an action on the 11th day of March, 1898, when he filed his affidavit for attachment, such action was commenced in the county court and not before the county judge acting as a justice of the peace. The provisions of chapter 20 of the Compiled Statutes, entitled "Courts," wherein the practice of the district court is made applicable to the county court in all cases where the amount in controversy is beyond the jurisdiction of a justice of the peace, gave the county court in this case full and complete power and authority to hear the motion to dissolve

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the attachment and enter the proper judgment or order thereon. The practice in such cases in the county court should be the same as that pursued in the district court. Therefore the court did not err in hearing the motion to dissolve the attachment.

3. It is apparent in this case, from the record, that the order of the court dissolving the attachment was made upon conflicting evidence. On a review of a ruling on a motion to dissolve an attachment, if the evidence is conflicting, the ruling will not be disturbed unless clearly wrong. *Nebraska Moline Plow Co. v. Klingman*, 48 Neb., 204; *Smith v. Bowen*, 51 Neb., 245.

As we have heretofore observed, there is no bill of exceptions preserved in this record. It is the rule of this court in such cases to presume that the evidence introduced before the trial judge in such a matter, where it is not brought before us by a proper bill of exceptions, is sufficient to sustain his judgment, and therefore we are constrained to hold that the judgment of the county judge in sustaining the motion to dissolve the attachment herein was right, and that the district court did not err in affirming such order.

For the foregoing reasons we recommend that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

AFFIRMED.

JOHN W. HARRIS V. NYE & SCHNEIDER COMPANY.

FILED JUNE 4, 1902. No. 11,952.

Commissioner's opinion. Department No. 2.

- 1. Appeal and Error: SUSTAINING DEMURRER TO ANSWER: ASSIGNMENT IN PETITION IN ERROR.** Where a demurrer is sustained to defendant's answer and he refuses to plead further, the action of the trial court in sustaining such demurrer will not be reviewed here unless such action is specifically alleged against in the petition in error.

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2. **Mortgage Foreclosure: REPEAL OF DEFICIENCY STATUTE: ACTION BEGUN PRIOR TO REPEAL.** Where an action in foreclosure was instituted before the repeal of section 847 of the Code of Civil Procedure the court is authorized to enter a deficiency judgment against those personally liable on the debt, when a deficiency exists, notwithstanding the repeal of said section. *Patrick v. National Bank of Commerce*, 63 Neb., 200, 88 N. W. Rep., 183, followed.
3. **Limitation of Actions: MORTGAGE FORECLOSURE BEGUN BEFORE NOTE BARRED: TOLL OF STATUTE.** The institution of a suit of foreclosure on a mortgage before the note evidencing the indebtedness is barred by the statute, tolls the statute on the note from the time of the commencement of the foreclosure action.

ERROR from the district court for Dodge county. Tried below before MARSHALL, J. *Affirmed.*

F. W. Button, for plaintiff in error.

Courtright & Sidner, contra.

OLDHAM, C.

This is a proceeding in error to review the judgment of the district court for Dodge county, Nebraska, in entering a deficiency judgment against John W. Harris, plaintiff in error. The record discloses that an action of foreclosure on a note and mortgage was instituted by the defendant in error on a cross-petition in August, 1896. The petition sets out the note and mortgage in the ordinary form, and prays, among other things, for a judgment for deficiency, if any. The sale of the mortgaged property was confirmed and a deed ordered in December, 1897. The proceeds of the sale were applied to the satisfaction of a prior mortgage and a large deficiency remained on the judgment of defendant in error.

In January, 1901, defendant in error filed his motion for a deficiency judgment. A copy of this motion was served upon plaintiff in error, who filed an answer to this motion denying his liability for a deficiency judgment because of the repeal of the law permitting deficiency judgments by the act of 1897, and alleging that

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the note on which the deficiency was sought was now barred by the statute of limitations. Defendant in error demurred to the answer. The demurrer was sustained by the trial court, and, plaintiff in error refusing to further plead, judgment was awarded defendant in error as prayed for in his motion. Plaintiff in error filed his motion for a new trial, which was overruled, and he now brings error to this court.

The proceeding might with propriety be cavalierly disposed of for the reason that plaintiff in error, neither in his motion for a new trial nor in his petition in error, has alleged error in the action of the trial court in sustaining the demurrer to his answer. It is plainly apparent that if any error was committed by the trial court at all, the error consisted in his ruling on the demurrer to the answer of plaintiff in error. But, aside from this, there was no error for the reason that the action to foreclose the mortgage had been instituted prior to the repeal of the deficiency judgment law, and consequently this action was not affected by such repeal.

The note was not barred at the time suit was instituted for the foreclosure of the mortgage, hence the institution of the suit tolled the statute of limitations on this note from the time of the commencement of the action. *Patrick v. National Bank of Commerce*, 63 Neb., 200, 88 N. W. Rep., 183.

We therefore recommend that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

Cedar County v. Goetz.

CEDAR COUNTY V. LOUIS GOETZ.

FILED JUNE 4, 1902. No. 11,959.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: OVERRULING ORAL MOTION FOR NEW TRIAL.** An oral motion for a new trial is not recognized in the practice of this state. Such a motion will not justify the granting of a new trial, nor will the overruling of such a motion be sufficient to present errors of law to either the trial or a reviewing court.
2. **Appeal and Error: NECESSITY FOR MOTION FOR NEW TRIAL.** This court will not review alleged errors occurring during the trial of a cause in the district court, by petition in error, unless a motion for a new trial was made in the trial court and a ruling obtained thereon.

ERROR from the district court for Cedar county. Tried below before GRAVES, J. *Affirmed.*

Benj. M. Weed, R. J. Millard, County Attorney, and C. H. Whitney, for plaintiff in error.

John Bridenbaugh, contra.

DAY, C.

From the decision of the board of county commissioners of Cedar county, disallowing in part a certain claim filed by him against said county, Louis Goetz appealed to the district court. On March 26, 1900, the case was tried to a jury, resulting in a verdict for the plaintiff, upon which on the same day judgment was rendered. To review this judgment the defendant has brought error to this court.

The record before us discloses an order made March 26, 1900, as follows: "Whereupon the defendant enters his oral motion for a new trial which is overruled, whereupon it is ordered and adjudged that the plaintiff have and recover from the defendant the sum of \$129.44 and his costs herein expended taxed at \$99.48." An oral motion for a new trial is not recognized in the practice of this state. Such a motion will not justify the granting

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of a new trial, nor will the overruling of such a motion be sufficient to present errors of law to either the trial or a reviewing court.

Section 317 of the Code of Civil Procedure specifically provides that the application for a new trial "must be by motion upon written grounds, filed at the time of making the motion."

In *Phoenix Ins. Co. v. Readinger*, 28 Neb., 587, it is said:

"The granting of a new trial, therefore, is not an arbitrary exercise of power, but a duty to be performed for adequate cause, and such cause or causes must be assigned in the motion, which motion in all its parts the statute requires to be in writing. An oral motion, therefore, is insufficient."

The record also shows that on the same day the judgment was rendered a motion for a new trial in the usual form was filed with the clerk. This motion evidently forms the basis of the petition in error filed in this court. The record, however, fails to disclose that this motion has been passed upon by the trial court.

It has been held repeatedly by this court, and is now the settled rule of practice, that alleged errors occurring during the trial of a cause in the district court by petition in error, will not be reviewed unless a motion for a new trial was made in the trial court and a ruling obtained thereon. *Jones v. Hayes*, 36 Neb., 526; *Leach v. Renwald*, 45 Neb., 207; *Koehler v. Summers*, 42 Neb., 330. Other cases supporting the rule can be readily found. Under this condition of the record the only question which we can review is whether the judgment is supported by the pleadings. The pleadings, in our opinion, clearly support the judgment.

We therefore recommend that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

Martin v. Mershon.

O. E. MARTIN V. L. D. MERSHON ET AL.

FILED JUNE 4, 1902. No. 11,962.

Commissioner's opinion. Department No. 3.

1. **Venue, Change of:** GRANTED EX PARTE BEFORE RETURN DAY: VALIDITY. An order of a justice of the peace, granting a change of venue, made on an *ex parte* hearing and before the return day of the summons, is void.
2. **Appeal and Error:** FROM JUSTICE: JURISDICTION ON FACE OF RECORD. Where the jurisdiction of a justice of the peace appears on the face of the record, error, to be available, must appear affirmatively.

ERROR from the district court for Dixon county. Tried below before GRAVES, J. *Reversed.*

W. A. Martin and *O. E. Martin*, for plaintiff in error.

J. H. Brown, *contra.*

ALBERT, C.

This case originated before a justice of the peace. The summons was returnable on the 23d day of November, 1899, and was actually returned on the 20th day of that month. Thereafter the following proceedings were had, as shown by the transcript of the justice's record:

"November 21, 1899, defendant attorney filed affidavit for change of venue; transcript made, and sent to Justice Hunter, November 22, 1899, setting time for trial at 11 o'clock forenoon, November 23, 1899.

"November 23, 1899. Plaintiff appeared at 10 o'clock, forenoon, and filed motion, asking permission to file a substituted bill of particulars. Motion sustained; and, it appearing that the change of venue heretofore granted was without authority of law and premature, the same is hereby set aside."

Then follows the entry of a default against the defendant, and of a trial of the case, and of a finding and judgment for the plaintiff. The defendant prosecuted error

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to the district court, when the judgment of the justice was reversed and the cause dismissed. From the judgment of the district court, the plaintiff prosecutes error to this court.

From the foregoing it will be seen that the order, granting the change of venue, was made before the return day, on an *ex parte* hearing.

It is urged by the defendant that such order, even though thus made, divested the jurisdiction of the justice, before whom the action was brought, and that plaintiff's remedy was by motion to remand, addressed to the justice to whom the transcript was sent. We do not concur in that view. It would extend this opinion to undue length to set out the provisions of the Code of Civil Procedure relative to a change of venue in actions pending before a justice of the peace. It must suffice to say they clearly preclude the theory that a change of venue may be granted, on an *ex parte* hearing, before the return day. Were such practice permitted, a party might appear, at the time fixed for trial, only to find that his case had been sent to another justice, who, in all probability, would have it disposed of before such party could put in an appearance. In our opinion the justice of the peace had no jurisdiction to act on the application until the return day, and his order, allowing the change before that time, was a nullity and might have been wholly ignored in the subsequent proceedings without affecting their validity. *Briggs v. Tye*, 16 Kan., 285; *Baker v. Thompson*, 89 Ga., 486. It follows that the jurisdiction of the justice was not divested by the order allowing the change.

It is next urged that, assuming the order was void, then it was the duty of the justice to pass on the application on the return day, before proceeding to a trial of the case, and to grant the change. The defendant failed to appear on the return day; had he appeared and allowed the trial to proceed without asking a ruling on his application, and without interposing any objection or saving any exceptions, he would be in no position to urge the

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complaint now under consideration. His failure to appear can not be held to obviate the necessity for such request, objections and exceptions, nor to excuse their omission. Besides, the application is not in the record; it may have been of such a character that the justice was warranted in ignoring it. Error, to be available, must affirmatively appear; it is never presumed. *McClure v. Lavender*, 21 Neb., 181. It does not so appear on the face of the record of the justice of the peace.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES and DUFFIE, CC., concur.

REVERSED AND REMANDED.

JAMES J. SKOW v. JOSEPH L. LOCKE.

FILED JUNE 4, 1902. No. 11,964.

Commissioner's opinion. Department No. 1.

1. **Replevin: JUDGMENT IN ALTERNATIVE.** A replevin judgment "that said defendant have and recover of and from the plaintiff the property heretofore replevied, or the sum of \$794, and the further sum of \$39.99 as damages, together with costs," is not open to objection as not being in the alternative.
2. **Trial: EVIDENCE CONFLICTING: INSTRUCTION AS TO WEIGHT OF SURROUNDING CIRCUMSTANCES.** An instruction "The jury are instructed that where the testimony of witnesses is irreconcilably conflicting, they should give great weight to the surrounding circumstances in determining which witness is entitled to credit," is prejudicial error where the vital elements of the case are affirmed by one party and denied by the other in the testimony.
3. **Appeal and Error: DATA IN RECORD IN REGARD TO INSTRUCTION: PRESUMPTIONS.** Where the record merely shows a date of filing an instruction that it was given and was excepted to, the giving and exception will be presumed to be contemporaneous.
4. **Appeal and Error: INSTRUCTIONS AS TO WEIGHT OF EVIDENCE.** The giving of correct instructions, will not cure the error of one which invades the province of the jury as to determining the weight of evidence.

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5. **Appeal and Error: ABSTRACT INSTRUCTION NOT APPLICABLE TO CASE.**
Not error to refuse an abstractly correct instruction which has no direct application to the evidence in the case.
6. **Frauds, Statute of: PROOF OF TRANSFER OF LAND: RECOVERY OF CONSIDERATION.** The statute of frauds furnishes no objection to proof of a completed transfer of an interest in land, where the only question is the recovery of its consideration.
7. **Appeal and Error: OBJECTION TO EXHIBIT WHERE PART ADMISSIBLE.**
An objection to an exhibit as a whole is properly overruled where a part of it is admissible.
8. **Appeal and Error: EVIDENCE OF AUTHENTICITY OF DOCUMENT: SHOULD GO TO JURY.** Where there is evidence tending to show the authenticity of a document sufficient, if believed, to establish it, the jury should pass upon it and its admission is no error.
9. **Appeal and Error: REPLEVIN AFFIDAVIT: DEFECTS NOT SHOWN.** Defects in a replevin affidavit not brought to this court with the record will not be considered.

ERROR from the district court for Gage county. Tried below before STULL, J. *Reversed.*

Babcock, Sackett & Spafford, for plaintiff in error.

J. N. Rickards and *J. E. Cobbey*, *contra.*

HASTINGS, C.

In this case the defeated plaintiff brings error from a judgment in replevin of Gage county district court. Twenty-five assignments of error are made, only seven of which are urged in counsel's brief in this court. The last one is here presented first, and is that there was error in the replevin judgment, because it was not in the alternative. The judgment is in this form: "It is therefore ordered by the court that the said defendant have and recover of and from the plaintiff, James J. Skow, the property heretofore replevied, or the sum of \$794, and the further sum of \$39.99 as damages, together with his costs taxed at \$——." In our opinion the judgment is in the alternative and is not subject to any complaint of plaintiff on that score. A return of the property would have relieved the plaintiff, not only of the charge for its

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value, but, under the form of this judgment, of damages and costs as well.

Complaint is next made that the trial court should not have instructed the jury as follows:

"The jury are instructed that where the testimony of witnesses is irreconcilably conflicting, they should give great weight to the surrounding circumstances in determining which witness is entitled to credit."

This is complained of because it did not confine the attention of the jury to the surrounding circumstances proved at the trial, and also because it sought to instruct them what weight to attach to these circumstances. Defendant in error replies that the instruction complained of was just as good for one party as the other and did not prejudice plaintiff in error, and also says that the cases cited by plaintiff in error are not in point on a general instruction, such as the one complained of. In *First National Bank v. Lowrey*, 36 Neb., 299, where the issue was fraud, the jury was advised that certain matters particularly mentioned by the instruction were "strong evidence of a secret trust." This was held prejudicial, as defendant in error claims, because of the singling out of particular evidence on one side. To its conclusion in that case this court cited *Gillet v. Phelps*, 12 Wis., 437; *Wilcox v. Young*, 66 Mich., 687, 33 N. W. Rep., 765; *People v. Ah Sing*, 59 Cal., 400. *Gillet v. Phelps* was also a fraud case. An instruction recited certain facts and told the jury if they were found to exist, they were evidence of fraudulent intention. This was held erroneous because the language implied that these facts would be sufficient evidence and such as would require a finding of fraud. It was held that evidence must be submitted to the jury in such a manner as to leave the jurors themselves to determine its weight.

Wilcox v. Young is another fraud case, which was affirmed, notwithstanding a refusal to instruct that certain circumstances which there was evidence tending to show furnished a strong presumption of fraud. "Whether the

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presumption claimed was strong or weak was for the jury and not for the court to determine."

The case of *People v. Ah Sing*, 59 Cal., 400, was a prosecution for burglary in which the court instructed the jury that the unexplained possession of stolen property immediately following the time when it was taken, supported by other evidence and circumstances, is a strong circumstance to show guilt. The court says that whether it was a strong or slight circumstance was for the jury to determine and not the trial judge.

We are not able to distinguish the instructions, considered in these cases, from the one presented here. We are constrained to think that the learned trial judge erred in expressing an opinion as to the degree of weight to be attached to the surrounding circumstances in determining the credibility of witnesses.

Defendant in error urges that this instruction was not excepted to at the time of giving. The record only shows that it was given and excepted to and filed on December 8. The verdict was returned on December 10, and was a sealed one, and bears date of December 8. It will be presumed that the instruction was given, filed and excepted to on December 8, and in proper time. If counsel desire to object to the time of exception, they should keep the record in condition to show the relative time of exceptions. One error will not be presumed in order to do away with another.

The main dispute in this case turns upon an alleged credit of \$500 claimed by defendant. Plaintiff denied his alleged signature to a receipt for it. Defendant affirmed that the receipt was written and signed by plaintiff in the former's presence. It is reasonable to suppose that the surrounding circumstances must have been deemed by the defendant favorable to his side of the case, or his counsel would not have requested the court to instruct that such circumstances should have great weight. It is true that the trial court elsewhere informed the jury that they were to pass upon the relative credibility of the

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witnesses, and gave them careful instructions as to how they should do so, but it is quite possible that the jury permitted their decision, as to this disputed signature and other matters in which the witnesses made irreconcilable statements, to be governed by a consideration of the surrounding circumstances in a greater degree than these circumstances of themselves, and unassisted by this instruction, should, or would, have controlled them.

Complaint is also made of the refusal of the second instruction requested by the plaintiff to the effect that where one witness swore to a certain state of facts and an equally credible witness testified that it did not take place, and there was nothing to corroborate one more than the other, then the facts were not proven by a preponderance of the evidence. We are not pointed out any evidence to which this instruction was applicable, and are not able to discover any prejudice which resulted from its refusal, although its soundness as an abstract proposition is not disputed.

It is next complained that there was error in admitting evidence of an agreement by the plaintiff to endorse upon the note secured by the chattel mortgage, which is the basis of this action, \$500 in consideration of a sale to plaintiff by defendant of his equity of redemption in real estate which had been purchased at foreclosure sale by the plaintiff. The whole agreement, if there was one, relative to the sale of this equity of redemption, was in parol. It is claimed that the admission of the testimony was unwarranted for the reason that it was all incompetent, and the whole contract void under the statute of frauds. It may be conceded that the sale of an equity of redemption is a sale of an interest in land and that the contract to evidence such sale must be in writing under the statute of frauds. It does not follow, however, that the agreement to pay a certain sum for the transfer of such an interest must be in writing where the interest is actually transferred and the question is simply upon the collection of the agreed amount. It was not error to permit parol

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proof as to this transaction after its alleged completion in an effort to collect the consideration. *Jones National Bank v. Price*, 37 Neb., 291; *Harris v. Roberts*, 12 Neb., 631; *Galley v. Galley*, 14 Neb., at page 177.

Complaint is also made that the preponderance of the evidence is not in favor of the defendant's claim as to this \$500. The jury have passed upon this question; there is evidence to support their finding, and on plaintiff's showing the weight of such evidence is wholly a question for the jury. It would seem that he would be precluded from questioning the verdict, if the question was submitted under proper instructions.

The admission of Exhibit 10, a book account of the defendants, by which it was sought to prove the \$500 transaction, is complained of. The objection was made to the book as a whole, and the special complaint is because it was used in evidence to prove the following item: "Sept. 20th, equity in land S. E. 16-3-6, \$500." It is claimed that this is an entry outside of defendant's regular business, which is farming, and not a proper entry in his account book, and not one of which the account book under consideration could be used as evidence. Citation is made to *Gillet*, Indirect and Collateral Evidence, sections 177-180, and *Martin v. Scott*, 12 Neb., 42. In *Martin v. Scott*, the use in evidence by a bank of a register of bills receivable, to prove that a certain note was secured by chattel mortgage, was held error, the entry not being one embraced in the original use of "books of account." The holding in that case is that account books are not evidence of any transaction between the parties other than goods, wares and merchandise sold or delivered, and work and labor or services performed. It would seem, however, that the objection is not good against all the items on this book, and that the objection to it, as a whole, was properly overruled. *Walrod v. Webster County*, 110 Ia., 349, 47 L. R. A., 480.

The next error complained of is that exhibit 8, purporting to be a receipt for a portion of these items, including

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the \$500 item, was not sufficiently identified, nor its signature so proved as to entitle it to go to the jury. Its execution and signing by the plaintiff is expressly testified to by the defendant; it is as expressly denied by the plaintiff; a large number of experts were sworn on both sides, who express different opinions as to the authenticity of the purported signature of plaintiff; there was enough evidence tending to show the authenticity of the signature to warrant the court in submitting the question of its genuineness to the jury and permitting it to be read and shown to them for that purpose

The final complaint of the brier is that there was manifest error in the finding of the jury as to the amount due on the note, and in the finding as to the amount of payments made on it even if the \$500 credit is allowed. As we have concluded that there was error in directing the jury to give "great weight" to the surrounding circumstances in passing on the credibility of conflicting statements, and there must be in our view another trial, no advantage would result from an examination of this question. It will not be attempted.

It is claimed by defendant in error that, because of defects in the affidavit of replevin, a verdict for the plaintiff could not in any event be sustained and that it is immaterial what errors might have been committed by the court, as the result reached was the only one possible. We do not know what the affidavit in replevin may have contained. It is not to be found in this record. The petition and answer originally filed in the county court are here, together with the stipulation of the parties that the case should be tried in the district court upon the pleadings as filed in the county court. Whether or not this was a waiver of any defect in the affidavit it is not necessary to decide, for it will be presumed, in the absence of any showing to the contrary, that the affidavit was regular and sufficient.

For error in instructing the jury as to the weight to be given to the surrounding circumstances in determining

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irreconcilable conflicts between statements of witnesses, it is recommended that the judgment be reversed and the cause remanded for a new trial.

DAY and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. CHRISTOPHER G. REISS, v.
EDWARD P. HOLMES, JUDGE OF THE THIRD JUDICIAL
DISTRICT OF NEBRASKA.

FILED JUNE 4, 1902. No. 12,546.

91 NW 125
Commissioner's opinion. Department No. 2.

1. **Mandamus: DELAY IN APPLYING FOR: DENIAL OF, IN DISCRETION OF COURT.** Although delay in applying for a writ of mandamus is not an absolute bar, it may be sufficient ground in the discretion of the court, for denying the writ.
2. **Mandamus to Settle Bill of Exceptions: DELAY IN PRESENTING BILL: PROOF OF FACTS.** The relator in mandamus proceedings to compel settlement of a bill of exceptions must show a clear right to have his proposed bill allowed. Hence where the trial judge upon hearing evidence has found that delay in not presenting the bill in the time fixed by law was due to laches and neglect of relator, the latter will be held to very clear proof that such finding was erroneous and that he is entitled to have the bill allowed notwithstanding.

ORIGINAL application to this court for a writ of mandamus to require respondent to settle a bill of exceptions. *Writ denied.*

Willard E. Stewart, for relator.

F. J. Kelley, contra.

POUND, C.

Relator was plaintiff in an action of replevin in the district court for Lancaster county. Judgment having been entered for the defendant and a motion for a new trial

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having been denied, he served a proposed bill of exceptions upon defendant's counsel on the last but one of the eighty days allowed by the court for that purpose. Counsel objected to allowance of the proposed bill and refused to accept service of it or recognize it as such. Afterwards, and some time after the expiration of the period fixed by law, the bill was presented to the trial judge, who refused to settle it, stating in his order to that effect that "it was not presented within one hundred days from the last day of the term of said court at which motion for new trial was overruled." The proposed bill with this order was filed in the supreme court in connection with a transcript and petition in error, and there remained for over a year, and until stricken from the record for want of allowance in the trial court. The bill was then presented once more for settlement and this proceeding is brought to require such action.

We are strongly inclined to the view that the application should be denied by reason of unnecessary and unreasonable delay in making it. The writ of mandamus is not in all respects a writ demandable of right. Whether to grant it or refuse it is a matter resting to some extent in the discretion of the court. Undoubtedly this discretion is a legal, not an arbitrary one, and is to be exercised in accordance with established rules of law. There is no power to deny the writ arbitrarily where a case comes squarely within such rules. But so it is with respect to specific performance and many other remedies that allow of some latitude in judicial application. As was said in *State v. Commissioners of Phillips County*, 26 Kan., 419: "The writ of mandamus is not wholly a writ of right, but lies to a considerable extent within the sound judicial discretion of the court where the application is made, and no court should allow a writ of mandamus to compel a technical compliance with the letter of the law, where such compliance will violate the spirit of the law." On this ground it is generally held that laches or unreasonable delay, though not for the period of the statute of limita-

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tions, may afford reason for refusing the writ. 19 Am. & Eng. Ency. Law (2d ed.), 755, 756. And we think such is the rule. Although delay short of the statutory period is not an absolute bar, it may be sufficient ground, in the discretion of the court, for refusing relief. In the case at bar there was no reason for not applying for the writ at once, instead of filing the proposed bill and suffering it to lie in this court more than a year. It is true there is a showing that relator was suffering from mental disease during the time the record has been here. But that did not prevent the filing of a transcript and petition in error, nor has it precluded other proceedings, when the exigencies of litigation have required them. We are of opinion that this proceeding should have been begun before the proceedings in error were instituted, and that the delay was not necessary or reasonable.

But, in any case, the application should be denied upon its merits. The respondent states in his answer that at the time the bill was presented to him and he refused to sign it, the relator claimed that counsel for defendant in the principal case had retained the bill in his office for twenty-four days and thereby caused the delay in presenting it for settlement, while counsel for said defendant claimed that the delay was solely due to neglect and laches of relator and his counsel; that evidence was adduced by both parties; and that after hearing such evidence and the arguments of counsel he found that the delay was not caused by nor chargeable to said defendant and thereupon entered the order refusing to sign and settle the bill because not seasonably presented. The record in the principal case does not disclose more than that the bill was presented and settlement refused on the ground stated. The fact that a hearing was had and evidence adduced, the claims of the several parties, and the judge's conclusion with respect thereto do not appear. But so long as they do not contradict the record made in the district court and are not inconsistent therewith, but merely explain and supplement it, these facts are competent and ma-

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terial, and respondent's answer setting up such facts states a defense. By agreement at the hearing, the orders of the district court, the affidavit of the trial judge, and his answer, positively sworn to, were used as evidence, so that the allegations are sufficiently established. Many authorities hold that as the question was one of fact, to be determined by the trial judge on presentation of the bill for allowance, so long as he passed on it, after hearing the evidence, his decision that relator solely was at fault in not presenting the bill seasonably is not reviewable by mandamus. *State v. Cox*, 155 Ind., 593, 58 N. E. Rep., 849; *Brown v. Prewett*, 94 Cal., 502, 29 Pac. Rep. 51; *Sprague v. Fawcett*, 53 Cal., 408; *Ansonia v. Studley*, 67 Conn., 170. Whether these authorities are applicable to our practice or in accord with the course of decision in this state, we need not consider. Relator must show a clear right to have his proposed bill settled. *State v. Bowman*, 45 Neb., 752; *State v. Bartley*, 50 Neb., 874. His affidavit is a mere pleading. The answer amounts to a denial of the allegation that the delay in presenting the bill was without fault of relator. It may be open to objection as being argumentative, but no objection has been taken on this ground. *Judah v. The Trustees of Vincennes University*, 23 Ind., 272. In view of the express finding of the trial judge, after hearing evidence, that the delay was due to laches of relator and the admitted fact that the bill was not seasonably tendered, it is obvious that he ought to be held to very clear proof that such finding was erroneous and that he is entitled to have the bill allowed notwithstanding. No such proof is presented.

We recommend that the writ be denied.

BARNES and OLDHAM, CC., concur.

WRIT DENIED.

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FRANK P. ALLEN ET AL., APPELLANTS, v. FREDERICK PLAS-
MYERE ET AL., APPELLEES.

FILED JUNE 18, 1902. No. 11,566.

Commissioner's opinion. Department No. 1.

Payment: EXTENSION OF TIME: CONSIDERATION: PROMISE TO DO WHAT PROMISOR IS BOUND TO DO. Neither the promise to do nor the actual doing of that which the promisor is by law or subsisting contract bound to do is a sufficient consideration to support a promise in his favor. *Esterly Harvesting Machine Co. v. Pringle*, 41 Neb., 265.

APPEAL from the district court for Red Willow county.
Tried below before NORRIS, J. *Affirmed.*

W. R. Starr, for appellants.

J. S. Le Hew and Tibbets Bros., Morey & Anderson,
contra.

KIRKPATRICK, C.

This is a suit brought in Red Willow county by Frank P. and Julia A. Allen, asking an injunction against Frederick Plasmyere and J. R. Neel, sheriff. Trial was had in the district court, which resulted in a dissolution of the temporary injunction theretofore granted, and a dismissal of the suit, from which judgment Frank P. and Julia A. Allen appeal to this court. It appears from the record that in September, 1895, appellee, Plasmyere, brought an action in the district court for Red Willow county, asking the foreclosure of a mortgage against appellant, and obtained a decree of foreclosure. On May 15, 1897, there was due on the decree of foreclosure the sum of \$918.50 and costs of suit taxed at \$10.48. On that day an agreement was entered into, which in substance was that appellants were to pay on that date \$118.50, and on the first day of July, 1897, an additional \$100. These payments were to be credited upon the decree of foreclosure; \$35

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was to be paid on the first day of August, 1897, and on the first day of February, 1898. All taxes due on the premises were to be paid by appellants. At the end of a year, if all payments had been made by appellants, the principal sum due would yet be \$700, which it was agreed should be extended for a period of five years from February 1, 1897. In one part of the agreement it is said that the foreclosure case should be dismissed, and in another part it is provided that the decree is to be stayed for a period of one year without causing order of sale to be issued thereon.

Appellants made default in all payments but the first, but it seems that when appellee, Plasmyere, would issue an order of sale and offer the property for sale, appellants would come in and pay up. Two orders of sale were so issued, and in each instance before sale was made, the parties came together, and appellants made payments, and the order of sale was returned, not sold. On the 4th day of January, 1898, appellants were in default of two semi-annual interest payments, and were also in default of the payment of the taxes due at that time. Thereupon appellee, Plasmyere, caused to be issued an order of sale, which was placed in the hands of the sheriff, who proceeded to advertise the property for sale. Before the day of the sale, the temporary injunction heretofore referred to was obtained, restraining the sheriff from proceeding with the sale.

It is very clear that the judgment of the trial court in dismissing the proceedings was right for two reasons. (1.) Appellants had wholly failed to comply with the agreement which they had made, and at the time the order of sale was issued they were in default of two semi-annual interest payments, as well as in default of the payment of the taxes. It is contended by appellants that the contract entered into between them and Plasmyere amounted to a satisfaction and discharge of the decree. It is clear that the contract will not bear this construction. It amounted simply to an agreement on the part of appellee, Plasmyere, to stay the issuance of an order of sale for a year provid-

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ing certain payments were made. These payments were not made, and therefore appellee was under no obligation to grant the time provided for in the agreement. (2.) The action of the trial court is right because there was no consideration moving to appellee for the contract made. Appellants only agreed to make payments upon the decree and upon the taxes due against the premises. Both of such payments were due from them at the time, and the result of the agreement was to give them additional time in which to make payments which were already due, and the agreement was without consideration. The rule applicable is that part payment of a past due obligation is not a valid consideration for an extension of time in the payment of the remainder. The promise on the part of appellants to do that which they were already bound to do is not sufficient to support the promise in their favor. *Esterly Harvesting Machine Co. v. Pringle*, 41 Neb., 265, 59 N. W. Rep., 804. It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

JOHN TOOGOOD V. JOHN RUSSELL.

FILED JUNE 18, 1902. No. 11,923.

Commissioner's opinion. Department No. 1.

Judgment: IRREGULARITIES NOT JURISDICTIONAL: COLLATERAL ATTACK.

Mere irregularities in a judgment or order, which are not jurisdictional, do not render it subject to collateral attack.

ERROR from the district court for Dodge county. Tried below before HOLLENBECK, J. *Affirmed.*

Woolworth & McHugh, for plaintiff in error.

Dolezal, Cook & Cook, contra.

KIRKPATRICK, C.

This is a proceeding in error brought from the action of the district court for Dodge county, overruling a motion made by plaintiff in error to vacate and set aside an order of the district court requiring him to appear and make disclosure of property which he might have subject to the payment of a judgment theretofore entered against him by that court. The facts as disclosed by the record, briefly stated, are as follows: On the 14th day of June, 1900, a verdict was returned against plaintiff in error in the district court in a suit brought against him by defendant in error for damages sustained by reason of an assault and battery. A motion was made for a new trial, but no action taken thereon, and no judgment entered upon the verdict at that term. On November, 8, 1900, the May term, at which the verdict mentioned was returned, adjourned *sine die*. On the 15th day of December, 1900, following, on motion the court entered judgment *nunc pro tunc* against plaintiff in error in the sum of \$1.250, as of date June 14, the day the verdict was returned. On December 20, 1900, the court made an order against plaintiff in error requiring him to appear on January 3, 1901, and answer concerning his property. On January 10, 1901, plaintiff in error filed a motion to vacate and set aside this order. This motion was overruled, exceptions taken, and this action of the trial court is the question presented for consideration in this proceeding.

On the part of plaintiff in error it is contended that the action of the trial court in entering judgment *nunc pro tunc* was null and void, for the reason that, no judgment having in fact been ordered or directed during the term the verdict was returned, the court, at a subsequent term, had no jurisdiction to enter judgment *nunc pro tunc* as of the date June 14, 1900; and thus make its records show the entry of a judgment when none had been entered.

On behalf of defendant in error it is contended, first, that it was the duty of the clerk of the court, under the

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provisions of section 438, Code of Civil Procedure, to enter the judgment on the verdict, and that no action on the part of the court was necessary; that the section referred to was in fact an order directing the clerk to enter judgment. Second, that the proceeding taken is a collateral attack upon the judgment, and can, therefore, not be sustained. It seems clear that the second contention of defendant in error is correct, and must be sustained. The authority of a court of general jurisdiction to enter judgments *nunc pro tunc* in furtherance, and to prevent a failure, of justice, is no doubt broader than the contention of plaintiff in error would seem to indicate. *McNamara v. New York, L. E. & W. R. Co.*, 28 Atl. Rep. [N. J.], 313.

But of the correctness of the action of the trial court in the matter of entering the judgment *nunc pro tunc* we are not concerned in this proceeding, unless such action was void for want of jurisdiction. There can be no doubt that the proceeding in the case at bar is in the nature of a collateral attack upon the judgment in question, and the rule is well settled that unless the judgment complained of is absolutely void, such attack can not avail. *Roberts v. Flanagan*, 21 Neb., 503; *Hilton v. Bachman*, 24 Neb., 490; *Oakley v. Pilger*, 30 Neb., 628; *Tzschuck v. Mead*, 47 Neb., 260.

In the case at bar a verdict in due form had been returned, which entitled defendant in error to a judgment thereon. No judgment appears in fact to have been entered at the term at which the verdict was returned. The verdict did not for that reason lose any portion of its vitality; the court still retained jurisdiction of the case, and it was its duty to enter judgment thereon. It follows that defendant in error was entitled to a judgment at the time the judgment complained of was entered. Whether it should have been entered *nunc pro tunc*, as of date the verdict was returned, is not material in this case and will not be determined. It is manifest that, the court having jurisdiction to enter judgment at the time the judgment was entered, the fact that it made the judg-

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ment read *nunc pro tunc*, as of date the verdict was returned, would at most be erroneous or a mere irregularity.

Plaintiff in error took exceptions to the entry of the judgment complained of at the time it was entered, and filed a motion for a new trial, which was overruled, and took exceptions to such rulings. Plaintiff in error might have reviewed by proceedings in error the action of the trial court in entering the judgment *nunc pro tunc*. This he did not see fit to do, and it is clear that the question can not be presented and determined in a motion to vacate an order based upon such judgment. The action of the trial court in denying the motion is right, and it is recommended that the same be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

CHARLES S. JOSLIN ET AL., APPELLEES, v. DORA E. WILLIAMS, APPELLANT, ET AL.

FILED JUNE 18, 1902. No. 12,547.

90 NW 1124
Commissioner's opinion. Department No. 2.

Receiver for Mortgaged Property. First National Bank of Greenwood v. Reece, 64 Neb., 292, 89 N. W. Rep., 804, followed.

APPEAL from the district court for Douglas county. Tried below before SLABAUGH, J. *Reversed and application for a receiver dismissed.*

B. N. Robertson, for appellant.

Hamilton & Maxwell, contra.

POUND, C.

This is an appeal from an order appointing a receiver of mortgaged property. At the time the mortgage was executed, the appellant and her husband occupied the property as a homestead. Subsequently the husband died

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and sometime thereafter the only child married and removed from the state. Thereupon appellant leased the house on the premises, reserving one room for her own use, and went to the home of her mother in another state. She testifies that her absence is temporary only, and we do not think there is sufficient in her evidence or in the circumstances to show abandonment of a homestead. *Edwards v. Reid*, 39 Neb., 645; *Mallard v. First National Bank of North Platte*, 40 Neb., 784; *Corey v. Schuster*, 44 Neb., 269. The sole question, therefore, is whether she may claim the property as her homestead; for in such case a receiver ought not to be appointed. *Laune v. Hauser*, 58 Neb., 663. This very question has been determined recently in the case of *First National Bank of Greenwood v. Reece*, 64 Neb., 292, 89 N. W. Rep., 804. Following that decision, we think it clear that appellant is entitled to hold the mortgaged property as a homestead as against all debts or claims accruing prior to her husband's death, whether she now occupies as head of a family or not. Accordingly we recommend that the order appointing a receiver be reversed and the plaintiffs' application dismissed.

BARNES and OLDHAM, CC., concur.

The order appealed from is reversed and plaintiffs' application for a receiver dismissed.

REVERSED AND DISMISSED.

Opinion on rehearing follows.

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CHARLES S. JOSLIN ET AL., APPELLEES, V. DORA E. WILLIAMS, APPELLANT, ET AL.

FILED FEBRUARY 4, 1903. No. 12,547.

^{93 NW 701}
Commissioner's opinion. Department No. 2.

Receiver of Mortgaged Premises: RIGHT OF WIDOW OF MORTGAGOR OVER MORTGAGEE. The mortgagee of a homestead is not entitled to a receiver as against the widow of the mortgagor to whom the property has passed under section 17, chapter 36, Compiled Statutes.

REHEARING of case reported *ante*, page 192.

APPEAL from the district court for Douglas county. Tried below before SLABAUGH, J. *Judgment below reversed.*

B. N. Robertson, for appellant.

Hamilton & Maxwell, *contra*.

POUND, C.

This is a rehearing. At the former hearing, we thought *First National Bank v. Reece*, 64 Neb., 292, 89 N. W. Rep., 804, controlling, and recommended a judgment of reversal. But some serious considerations bearing upon the proper construction of section 17, chapter 36, Compiled Statutes, were urged upon us, and induced us to recommend a rehearing. Upon a second argument, we adhere to our former opinion that a receiver should not have been granted, but think it expedient to state the reasons for such holding somewhat differently, and more in detail. The case, briefly stated, involves the question whether the mortgagee of a homestead is entitled to a receiver as against the widow of the mortgagor to whom the property has passed under section 17, chapter 36, Compiled Statutes. Counsel urge that said section does not create a general homestead interest in the survivor, but merely disposes of the property and creates a special exemption from all debts incurred during the joint occupancy, which is much more limited than the exemption provided by sections 1

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and 3. Hence, they contend, as to liabilities of the kind referred to in section 3, the property in the hands of the survivor is not in any sense a homestead, but stands on the same basis as an ordinary tract. We do not think such a result follows. In its first section, the statute provides that the tract occupied as a homestead shall "be exempt from judgment liens and from execution or forced sale, except as in this chapter provided." Section 3 provides that the homestead shall be "subject to execution or forced sale in satisfaction of judgments obtained: First—on debts secured by mechanics', laborers' or vendors' liens upon the premises. Second—on debts secured by mortgages upon the premises." Section 17, after fixing the mode in which the property shall devolve upon death of the person from whose estate it was selected, proceeds: "In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife or either of them previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter." Beginning with *Bowker v. Collins*, 4 Neb., 494, the court has said repeatedly that the provisions of this statute are to be construed liberally to advance the end and purpose which the legislature obviously had in view. Hence, although the language of the sections cited might justify the construction contended for by counsel, we have still to consider whether such a construction is in accord with a liberal view of the object of the statute. That object, as stated in *Bowker v. Collins*, *supra*, is to "preserve a home to the unfortunate" and "prevent the household being broken up and destroyed." Hence the statute endeavors to provide for the survivor after death of the head of the family, or of the member from whose estate the homestead was selected, by granting a life estate to such survivor and putting the property in his or her hands, as to all pre-existing claims, where it stood when occupied by both. It does not require any straining of the language employed to give effect to this purpose.

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If the statute had read "shall not be subject to payment of any debt or subject to any liability" except such as were created under section 3, there would be no question. We think the section is to be read in that way. The language of section 17 is far from clear at many points, and has given the courts some trouble. *Schuyler v. Hanna*, 31 Neb., 307; *Fort v. Cook*, ante, page 12, 90 N. W. Rep., 634; *First National Bank v. Reece*, supra. But the general intention is so obvious, and the purpose in view so salutary, that the literal meaning or grammatical construction of particular clauses do not necessarily afford formidable obstacles. It would do violence to the fundamental principles of the statute to hold that the widow could be turned out of the homestead by the appointment of a receiver and forced to seek a new home or pay rent the day after her husband's death, though in his lifetime possession of the homestead was secure. Reading section 17 as suggested above, since section 3 does not make the homestead liable to receivership when occupied by husband and wife, such liability will not attach to it, as to pre-existing claims, in the hands of the survivor. *Chadron Loan & Building Association v. Smith*, 58 Neb., 469.

We therefore recommend that the former judgment be adhered to.

BARNES and OLDHAM, CC., concur.

FORMER JUDGMENT OF REVERSAL ADHERED TO.

GUSTAVE BIART ET AL. V. W. H. MYERS ET AL.

FILED JULY 1, 1902. No. 11,154.

Commissioner's opinion. Department No. 3.

1. Judgment of Inferior Court: JURISDICTIONAL STEPS TAKEN OMITTED FROM TRANSCRIPT. Ordinarily, when a judgment or order of an inferior court is assailed on the ground of a want of jurisdiction,

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every fact essential to jurisdiction must affirmatively appear; but such rule has no application, when the transcript before the reviewing court shows on its face that the jurisdictional steps, actually taken, are omitted therefrom.

2. **Schools and School Districts: FORMING NEW DISTRICT: SUBSTANTIAL COMPLIANCE WITH STATUTE.** While a superintendent of public instruction acts judicially in forming a new school district from territory embraced within the boundaries of other districts, it does not follow that his findings and orders in the premises must be entered with all the formality of a judgment of a court of law; if the record shows a substantial compliance with the statute, it is sufficient.
3. **Schools and School Districts: FORMING NEW DISTRICT: RULINGS OF SUPERINTENDENT: PREJUDICE.** The rulings of the superintendent, fixing the time of hearing petitions for the formation of such district, and on applications for a continuance, examined, and held not prejudicial error.

ERROR from the district court for Sarpy county. Tried below before KEYSOR, J. *Affirmed.*

Wm. R. Patrick, for plaintiffs in error.

Will H. Thompson, *contra.*

ALBERT, C.

The plaintiff filed his petition in error in the district court, praying the reversal of an order of the superintendent of public instruction of Sarpy county, forming a new school district from territory belonging to two other districts. The district court affirmed the order of the superintendent, and the plaintiff prosecutes error to this court. The facts necessary to an understanding of the errors relied upon sufficiently appear in the discussion of such errors in the body of the opinion.

Section 4, subdivision 1, chapter 79 of the Compiled Statutes, under which the proceedings before the superintendent were had, so far as material at present, is as follows:

"New districts may be formed from other organized districts, and boundaries of existing districts may be

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changed under the following conditions only: First—The county superintendent shall have discretionary power to create a new district from other organized districts, upon a petition signed by one-third of the legal voters in each district affected. * * * A notice of said petition, containing an exact statement of what changes in district boundaries are proposed, and when the petition is to be presented to the county superintendent, shall be posted in three public places, one of which places shall be upon the outer door of the school house, if there be one, in each district affected, or territory not organized into districts, proposed to be attached to an existing district, at least ten days prior to the time of presenting the petition to the county superintendent. * * * Fifth—A list or lists of all the legal voters in each district (or territory) affected, made under the oath of a resident of each district (or territory) affected, together with an oath of a resident of each district (or territory) that the legal notice provided for in the third clause of this section has been properly posted, shall be given to the county superintendent when the petition is presented.”

It is first insisted that the record shows that no proper proof of the posting of the notices or authenticating the list of voters, was presented to the superintendent, and for that reason he was without jurisdiction. The record of the superintendent sets forth the petitions presented by electors of the two districts. Immediately following one of the petitions is the recital, “This petition was accompanied by a list of the legal voters of said district, by a resident of said district under oath, and by affidavits that the necessary notices had been posted by legal residents of said district.” In the same way the other is followed by a recital in these words: “The above petition was accompanied by the necessary affidavits showing that notices had been posted by a legal voter of said district and a list of the legal votes of said district by a resident of said district under oath.” It is argued that mere statements of conclusions in the affidavits are insufficient;

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that they must state the facts showing a compliance with the statute. In support of this position, *Dooley v. Meese*, 31 Neb., 424, is cited by the plaintiff. The proposition is sound, but it is not applicable in this case. In *Dooley v. Meese*, *supra*, the affidavit was before the court; in the present case it is not. The recitals do not purport to state the contents of the affidavits; they were doubtless intended to show that the jurisdictional steps had been taken. The record shows on its face that it is incomplete; that the jurisdictional affidavits are omitted. While it is true that, when a judgment or order of an inferior court or tribunal is assailed, as in this case, every fact essential to jurisdiction must affirmatively appear, the rule has no application when the transcript before the reviewing court shows on its face that the jurisdictional steps actually taken are not included in it.

It is next urged that the superintendent made no findings on which a valid order forming a new district could be based. While it is true, as stated by counsel, that it has been held by this court that in forming a new district, as in this case, the superintendent acts judicially, and that a finding is essential to a judgment, when assailed by proceedings in error, it does not follow that the findings and judgment, in matters of this kind, should be entered with all the formality of a judgment of a court of law. A county board acts judicially in the allowance or rejection of claims against the county; yet in *Black v. Saunders County*, 8 Neb., 440, it is said, "It is sufficient if it appear from the records, kept by the county clerk, that the claim was duly presented, and that it was allowed or rejected. Great formality in this matter is not to be expected of them, nor is it required." The record in this case shows that the jurisdictional steps were taken; that the petitions were in due form, showing the boundaries of the new district. The order of the superintendent, so far as is material at present, is as follows: "It was considered by me that the petitions from districts Nos. 1 and 4 (they being the districts whose electors petitioned for

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the order) should be granted. * * * I therefore formed a new district to be known as school district No. 40, comprising the above described territory." In our opinion, the complaint of a lack of findings to sustain the order is unfounded.

Another ground relied upon for a reversal in this case is, that "there is no finding of the value of the property retained by either district." Reference is had to the requirements of section 9, of the subdivision above cited, which, so far as is material at present, is as follows: "When a new district is formed in whole or in part from one or more districts possessed of a school house or other property, the county superintendent, at the time of forming such new district, or as soon thereafter as may be, shall ascertain and determine the amount justly due to such new district from any district or districts out of which it may have been in whole or in part formed, which amount shall be ascertained and determined as nearly as practicable according to the relative value of the taxable property in the respective parts of such former district or districts at the time of such division."

The record of the superintendent on this point is as follows:

"November 12, 1897. And after a careful examination of the school buildings and other school property belonging to the two old districts, Nos. 1 and 4 and retained by them, and the relative value of the taxable property cut off from said districts, compared with the property retained by said districts, I believe the actual value of the school property in school district No. 1, is \$3,000, including school house, site and moneys, I find that school district No. 40 should receive as its share of the property retained by school district No. 1, the sum of \$453.33 which will require a school tax of six mills in school district No. 1, the proceeds to go to school district No. 40, and I certify the same to the county clerk according to law.

"I fix the value of the school house and site in school district No. 4, at \$800 and further find that there are \$1,325

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in the hands of the treasurer of said district, making a total of \$2,125, of which school district No. 40 is entitled to \$786.25.

"I sent directions to the directors to draw warrants in favor of Adam Kas, treasurer of school district No. 40."

The office of superintendent of public instruction is not, as a rule, filled by persons learned in the law. Technical accuracy of expression is not to be expected of them, nor is it required. To hold them to the technical forms, insisted upon in this case, would seriously embarrass, not only such officers in the discharge of their duties, but the public at large. In our opinion, the record shows a substantial compliance with the section last quoted. That is sufficient. We are cited to *Ratcliff v. Faris*, 6 Neb., 539, and *State v. Clarcy*, 25 Neb., 403. Neither case is in point on this question, as presented by the record.

Some complaint is made of the order of the superintendent, changing the time of the final hearing from the 30th day of October, to the 29th of the same month, and denving a further continuance. But the order, fixing the time of hearing for the 30th, was made on the 23d day of October, and the change was made on the same day, presumably immediately after. No prejudice is shown, nor does it appear that any one was misled by the change. We think the complaint is unfounded.

It is recommended that the judgment of the district court be affirmed.

DUFFIE, C., concurs.

AFFIRMED.

Bowditch v. O'Linn.

E. B. BOWDITCH, APPELLEE, V. FANNIE O'LINN ET AL.,
APPELLANTS.

FILED JULY 1, 1902. No. 11,456.

Commissioner's opinion. Department No. 1.

1. **Mortgage Foreclosure: SALE UNDER THIRD ORDER OF SALE: PRESUMPTION AS TO PURCHASE PRICE.** Where it appears from the record, that after appraisal of property for sale under foreclosure, order of sale was recalled, and under another order of sale the property was again appraised, and was finally sold under a third order, in the absence of any showing to the contrary, it will be presumed that the property brought two-thirds the amount of each appraisalment.
2. **Mortgage Foreclosure: DESCRIPTION IN ORDER OF CONFIRMATION.** Failure to specifically describe the property, or to name the purchaser, in the order of confirmation, not a fatal defect, where both are rendered certain by reference to the order of sale and the return.

APPEAL from the district court for Dawes county.
Tried below before HOLLENBECK, J. *Affirmed.*

F. O'Linn, for appellants.

G. A. Eckles, *contra.*

HASTINGS, C.

The appeal in this case is from confirmation, by the Dawes county district court, of a real estate sale. Appellant complains because the sale was without an appraisal of the real estate; because there were two appraisals, and the second one without the property having been twice offered for sale under the first; and that the order of confirmation is invalid and insufficient because it does not contain a description of the property, nor the name of the purchaser. The appellant moved in the district court the "quashal" of the order of sale for a variety of reasons, which were overruled. The objections here are those named.

The facts claimed are that on August 23, 1898, an order

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of sale was issued and an appraisement had under it and on the following day it was by the plaintiff recalled; no appraisal was filed under it, but it appears from the return of the sheriff, that one was had; on September 6 another writ was issued, another appraisement had, and a copy of it filed and the real estate advertised for sale, but was not sold, and apparently the order of sale was returned upon motion of plaintiff. In June, 1899, a third order of sale was issued, and sale made under the appraisement of September, 1898. The claim is made, first, that the appraisal of August, 1898, was in force, and second, that there was no appraisal under the third order of sale. There is nothing, except the former appraisal, to show that the one under the second order of sale was irregular; there is nothing to show whether it was higher or lower than the one made in August, and we are obliged to presume, in the absence of any allegation to the contrary, that the property sold for at least two-thirds of the first appraisement; if so, it would not matter under which appraisement the sale was ostensibly had. The order of confirmation does not describe the premises except by reference to the order of sale, nor does it name the purchaser except by like reference; both sufficiently appear from the entire record and we do not think the failure to mention them in the order of the confirmation is a fatal defect.

It is recommended that the action of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

Grainger v. Erwin.

HARRY B. GRAINGER ET AL., APPELLEES, v. OLIVER S. ERWIN ET AL., IMPLAINED WITH JOHN W. CRAWFORD ET AL., APPELLANTS.

FILED JULY 1, 1902. No. 11,507.

Commissioner's opinion. Department No. 3.

1. **Fraudulent Conveyances:** VENDEE'S KNOWLEDGE OF FRAUDULENT INTENT. While the vendor and vendee must both unite in a fraudulent intent, in order to avoid a sale as to the creditors of the vendor, it is sufficient for that purpose to show the fraudulent intent on the part of the vendor and knowledge of that intent by the vendee, or of sufficient facts to put a person of ordinary prudence on inquiry.
2. **Fraudulent Conveyances to Creditor:** PARTICIPATION IN FRAUD BY CREDITOR. A sale made by an insolvent debtor to one of his creditors in payment of a pre-existing debt, will not be held void merely because the creditor had notice of an intent upon the part of the debtor to hinder, delay or defraud his creditors, provided the conveyance does not cover more property than is reasonably necessary to discharge the indebtedness existing. In order to avoid such a sale it is not sufficient to show that the creditor merely desired to secure his own debt, it must be shown that he participated in the fraudulent intent of his grantor.

APPEAL from the district court for Lancaster county.
Tried below before FROST, J. *Affirmed.*

Strode & Strode and Thomas D. Crane, for appellants.

Sawyer & Snell, Frank H. Woods and W. E. Stewart,
contra.

DUFFIE, C.

In the month of October, 1897, Oliver S. and James E. Erwin engaged in the retail grocery and coal trade in Lincoln under the partnership name of Erwin Bros. They continued in the business until the 29th of January, 1898, and on the evening of that day sold their entire stock of goods to the defendant, Crawford, for \$650 cash, and gave bill of sale on their store fixtures and book accounts to William E. Kisor in part payment of his claim. There-

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after various of their creditors placed their claims in judgment and commenced this action in the nature of a creditors' bill, alleging that the sales to Crawford and Kisor were made for the purpose of cheating and defrauding their creditors, and asking that the sales be set aside and the value of the goods applied to the payment of their respective judgments. On a trial of the case the district court made the following findings: "That the defendants, Erwin Bros., in the early part of October, 1897, until January 29, 1898, were engaged in the retail grocery and coal business in the city of Lincoln, Nebraska; that the said judgments were obtained for money due for goods and merchandise sold the said Erwin Bros. while engaged in said business; that on the night of January 29, 1898, the said Erwin Bros. made a conveyance of their stock of groceries to the defendant, John W. Crawford, for a consideration paid of about \$650 and on the same night made their bill of sale, intended as a mortgage, of the fixtures of said business, and also an assignment of all their book accounts, to the defendant, W. E. Kisor; that at the time of the conveyances they were indebted to the defendant, Kisor, in the sum of \$1,120 for money loaned as shown by the notes introduced in evidence; that at the time of making the loan of said money, the said Kisor knew that the said Erwin Bros. were being pressed by their creditors for the payment of their indebtedness; that the last advancement of \$390 was made to them after his claim had been placed in the hands of his attorney with instructions to protect his interests; that at the time of making the loan of said money the said Kisor was promised by the said Erwin Bros. that in event of a failure his interests would be protected; that the said conveyances of their stock, fixtures and accounts by Erwin Bros. on Saturday night, January 29, 1898, was made on their part with the intent to hinder and delay their creditors; that they were then insolvent and made the conveyances at the time and in the manner they did, so as to convert their property into cash and place it beyond

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the reach of their creditors, except the creditor defendant, Kisor; that at the time of the purchase of said stock of goods by the defendant, Crawford, he knew that the said Erwin Bros. were insolvent and being pressed by their creditors and that the sale was being made upon their part with the intent of hindering and delaying their creditors, and to place their property beyond the reach of creditors as aforesaid, and he participated therein; that at the time of the bill of sale, intended as a mortgage, and assignment of accounts to the defendant, Kisor, he also knew that the said Erwin Bros. were insolvent, were being pressed by creditors, and that the conveyances were made with intent to hinder and delay their creditors and place their property beyond their reach as aforesaid, and participated therein to this extent; that at the time the said conveyances were being made he was present and advised and urged the sale in order to secure payment of the amount due him; that all of the proceeds of said sale were by the defendants, Erwin Bros., applied in part payment of the indebtedness to the defendant, Kisor, and of their indebtedness to Raymond Bros.; that the value of the stock of goods conveyed to the defendant, Crawford, at the time of said conveyance was \$1,300; that the value of the fixtures and book accounts at the time of the conveyance of the same to defendant, Kisor, was \$300." The defendants have appealed from the judgment entered to this court.

Section 3191 of the Compiled Statutes of 1901 makes every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, made with intent to hinder, delay, or defraud creditors or persons of their lawful rights, void as against the person so hindered or delayed. Section 3195 is as follows: "The provisions of this chapter shall not be so construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

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These sections and the force to be given them have been before this court in numerous cases, and the rule is now well established that a sale made with the intent on the part of the parties to cheat or defraud, or hinder or delay, the creditors of the vendor is absolutely void. While the vendor and vendee must both participate in the fraudulent intent, it is well settled that where property is sold with a fraudulent intent on the part of the vendor, and the vendee has knowledge of the intent, or of sufficient facts to put a person of ordinary prudence upon inquiry, the sale is a fraudulent one. This rule obtains only as to volunteers and does not apply to creditors of the vendor.

In relation to a creditor of the vendor, he may obtain, pay or secure his debt by taking a reasonable amount of the debtor's property for that purpose. The rule in such cases is aptly and concisely stated by IRVINE, C., in *Jones v. Lorce*, 37 Neb., 816, in the following language: "To say that knowledge upon the part of an existing creditor of the debtor's intention to defraud creditors would render any security demanded by such creditor fraudulent would be equivalent to saying that the creditor is estopped from protecting himself by knowledge of the very facts which warrant him in seeking protection. A fraudulent intent may be very properly imputed to a stranger who knowingly assists the debtor in defeating his creditors by a purchase of the debtor's property, but no such intent can be imputed to an existing creditor because of his knowledge of such intent, when for the sole purpose of protecting himself he receives sufficient and reasonable security for that purpose. * * * The mere knowledge of the debtor's fraudulent intent would not defeat the mortgage; but the participating therein on the part of the mortgagee, or any motive upon his part not consistent with good faith, would have that effect. The following authorities sustain this view of the law: *Chase v. Walters*, 28 Ia., 460; *Kohn Bros. v. Clement*, 58 Ia., 589; *York County Bank v. Carter*, 38 Pa. St., 446."

This principle has been recognized by numerous subse-

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quent decisions and may now be regarded as the established rule in this state. The rules, then, by which we are to be governed in the determination of this case are as follows: 1st. The conveyance made by Erwin Bros. to Crawford, a stranger or volunteer, was fraudulent provided the parties to the sale intended thereby to defraud, hinder or delay the creditors of Erwin Bros., or provided Erwin Bros. were influenced in making the sale by such intent and Crawford had knowledge thereof, or of sufficient facts to put a person of ordinary prudence upon inquiry that such was the case; and, 2d. The transfer to Kisor was fraudulent only in case he was influenced in taking such conveyance by motives inconsistent with good faith. No particular objections are urged against the findings of the court, and there being, in our opinion, ample evidence to sustain them, we accept them as conclusive of the facts in the case. Counsel for appellants insist that the judgment is contrary to the findings, the findings being that Erwin Bros. made the conveyance to hinder and delay some of their creditors only, but to pay and prefer others; they argue that because of the exception in favor of the creditor, Kisor, that, therefore, the finding of the trial court amounts to nothing more than that the defendants, Erwin Bros., merely preferred Kisor, which they had a legal right to do. We can not agree with this construction of the findings. The trial court merely expressed in words what is understood in every instance where a debtor prefers a creditor with intent to either defraud, hinder or delay other creditors. The creditor who is preferred is not, of course, himself defrauded, hindered or delayed. He is protected and benefited. If this line of argument was to prevail in all cases, then there could be no fraudulent preference by an insolvent debtor because the creditor preferred would in no case be defrauded, hindered or delayed, and a showing that one or more of the creditors of the vendor was paid from the fund derived from the sale, would be a sufficient answer to the charge that the conveyance

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was fraudulent. As before stated, we have examined the evidence sufficiently to satisfy ourselves that the findings of the court are amply sustained thereby, and such being the case the legal conclusion that the sale to Crawford was fraudulent, results as a necessary consequence. The goods sold to Crawford were, as found by the court, of the value of \$1,300. Crawford paid for these goods \$650. If a failing debtor may dispose of his stock for fifty per cent. of its value and such a sale be sustained upon the ground that the proceeds were used in paying some of the creditors of the vendor, then a failing debtor may sell his stock for twenty-five or ten per cent. of the value thereof and the sale be sustained for the same reason. We do not feel like establishing the rule that an insolvent debtor may dispose of his assets at a moiety of their true value and then say that the sale must be sustained because the proceeds went to pay his debts. This would be to announce the rule that the debtor might practically give away his assets, leaving no redress to a large majority of his creditors.

We also think that the judgment must be sustained as against Kisor. While the law allows a creditor to secure himself by taking a conveyance of the property of his debtor or security thereon, it does not allow him to take an unreasonable amount. One of the latest expressions of this court is found in *Henney Buggy Co. v. Ashenfelter*, 60 Neb., 1. It is there said: "It is a well established principle of law that a debtor may prefer a creditor, and that such preference is not fraudulent, even though such creditor has knowledge of an intent on the part of such debtor to hinder, delay or defraud his other creditors, so long as such creditor takes only sufficient goods to satisfy the debt, or the value of which is not appreciably greater than the amount of such debt, and does not participate in such fraudulent intent. But, does a different rule obtain, when, in a case like this, the creditor takes more goods than are sufficient to liquidate the debt, paying the difference between their value and the debt in cash? We

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are of the opinion that another rule does apply; that a creditor who purchases the whole of his debtor's goods—said debtor being in failing circumstances—paying the difference between the amount of the debt and the fair value of the goods in cash, occupies the same position as would a purchaser not a creditor; and that if such purchasing creditor knows, or has such knowledge as would induce an ordinarily prudent person to inquire into facts which would lead to knowledge, that such debtor is attempting to defraud his other creditors by such sale, or to hinder and delay them in the collection of their debts, such a sale is void as to such creditors."

In the present instance Kisor, who, it may be here remarked, was a half-brother of the Erwin brothers, was present at the sale and advised and urged the sale in order to secure payment of the amount due him. In other words, the finding is that he participated in and was a party to the transaction. We do not wish to be understood as holding or intimating that if Kisor had taken no part in the consummation of this sale that it could be held void as to him or that the property, or the proceeds of the property, could have been followed into his hands. The evidence, however, discloses that the sale to Crawford could not have been consummated except upon the agreement of Kisor to take the store fixtures and the accounts, and that the sale to Crawford of one part of the assets and to Kisor of another, was really one transaction. A careful review of the findings of the court and the evidence on which it was based, convinces us that the judgment should be affirmed.

ALBERT, C., concurs.

AFFIRMED.

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AARON CONOVER ET AL. V. WALLACE W. WRIGHT ET AL.

FILED JULY 1, 1902. No. 11,518.

Commissioner's opinion. Department No. 1.

1. **Mechanic's Lien Foreclosure: ADJOURNMENT OF COURT TO DAY CERTAIN BUT FAILURE TO CONVENE: DECREE SENT TO CLERK BY JUDGE.** In a suit for the foreclosure of a mechanic's lien, trial was had to the court, but before making findings of fact or pronouncing judgment, the district court adjourned to a certain date several days later, and the judge returned to his home in another county. Court did not reconvene on the day named, but on that date the clerk received by express from the judge memoranda of his findings and decree in the case, which he entered of record. At the next succeeding term an application on the part of defendants in the case to correct the record to show that no decree was in fact entered was overruled. *Held, Error.*
2. **Mechanic's Lien Foreclosure: JUDGMENT AT CHAMBERS: VALIDITY.** A judgment rendered by a district judge at chambers in a mechanic's lien foreclosure is null and void.
3. **Judgment in Foreign County Without Change of Venue: MECHANIC'S LIEN FORECLOSURE.** A judgment rendered in a county other than that in which the cause was tried, unless there has been a change of venue to such county, is invalid.

ERROR from the district court for Webster county.
Tried below before ADAMS, J. *Reversed.*

Overman & Blackledge, for plaintiffs in error.

J. R. Mercer and B. F. Smith, *contra.*

KIRKPATRICK, C.

This is an error proceeding brought to this court by Aaron Conover and wife, to reverse a decree entered by the district court for Webster county, foreclosing a mechanic's lien, and also from an action by said court in sustaining a demurrer interposed by defendant in error, Wallace Wright, to an application made by plaintiffs in error to vacate and set aside the decree foreclosing the mechanic's lien. It is disclosed by the record that

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the cause was tried in the district court on October 6, 1899. After hearing the evidence, the court adjourned the term until October 14, 1899, the judge returning to his home in Adams county, Nebraska. It further appears from the record that on the 14th day of October, 1899, the district court did not reconvene, and the district judge was not in Webster county; but the clerk of the district court received by express memoranda of a decree as follows:

"October 6. Trial to the court. Court finds on the issues joined and evidence that the heating plant herein sued for is a failure for heating purposes, and that the boiler together with all the radiators, and pipes connecting said boiler with radiators, and the fixtures thereto, are the property of the plaintiff. Court holds that all other pipes, tanks, except expansion tank, are the property of the defendants, Conovers; also bath tubs, stationary wash bowls, are the property of defendants, Conovers. That after allowing damages and amounts paid by defendants court finds there is still due plaintiff the sum of \$315. Judgment on findings and decree of foreclosure. To which findings and judgment and decree plaintiff and defendants both except, exceptions allowed, and given forty days to prepare bill of exceptions."

These memoranda were signed by the judge, and upon the same instrument was the following: "Filed October 14, 1899, James Burden, clerk district court, Webster county."

The district clerk proceeded to enter up the decree of foreclosure upon the memoranda quoted. As soon as counsel for plaintiffs in error learned of the entry of this decree, and on the same day it was received and entered by the clerk, they filed a motion for a new trial. At the next succeeding term of the district court for Webster county, and on the 28th day of April, 1900, plaintiffs in error filed an application to cancel the judgment and to correct the record in accordance with the facts. In that application plaintiffs in error set up in detail all of the

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facts heretofore stated, and that the trial court at the time the cause was tried, made no findings and entered no decree, and that the only decree entered in the cause was that entered by the clerk of the district court on October 14, 1899, after receiving by express the memoranda prepared and sent by the judge showing his findings. Attached to this application was a copy of the decree. Notice of the filing of the application was duly served upon counsel for defendants in error, who appeared and filed a general demurrer to the application, upon the ground that the facts stated in the application were insufficient to entitle plaintiffs in error to any relief. The matter came on for trial in the district court, and on the 26th day of June, 1900, the demurrer was sustained, and the application on behalf of plaintiffs in error was overruled. To this ruling of the trial court exceptions were taken, and error is prosecuted to this court from the decree of foreclosure and from the action of the trial court denying the application to correct the record.

Numerous errors are assigned, but in the view we take of the proceedings, only one question need be considered. The decree in this case seems to have been entered by the judge of the district court for Webster county at chambers in Adams county, and there can be no doubt under the statutes of this state that such act was wholly without jurisdiction. The statute authorizes a judge to perform certain acts at chambers, but the statute does not authorize him to enter a judgment or decree foreclosing a mechanic's lien at chambers. Such judgment must be pronounced by a court, rather than by a judge of the district court. Again, it is equally clear that no decree could be entered, even by the district court, in a county other than that in which the cause is pending, unless a change of venue had been duly allowed upon an application of one or more of the parties to the cause. *Fiske v. Thorpe*, 51 Neb., 1. It is clear that in the case at bar, the pretended decree of foreclosure entered by the trial court is null and void. *Dalton v. Libby*, 9 Nev., 192. The trial court erred

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in overruling the application of plaintiffs in error to correct the record so as to show that no judgment had in fact been entered. It is therefore recommended that the action of the trial court in entering a decree of foreclosure and in overruling the application of plaintiffs in error to correct the record, be reversed and the cause remanded for further proceedings in accordance with law.

HASTINGS and DAY, CC., concur.

The decree of the district court awarding foreclosure and the order of the district court overruling the application of the plaintiffs in error to correct the record are reversed and the cause remanded.

REVERSED AND REMANDED.

EDWARD MERUNDE V. WILLIAM BEHNKE.

FILED JULY 1, 1902. No. 11,535.

Commissioner's opinion. Department No. 3.

Conversion: PLEADING AND EVIDENCE: SUFFICIENCY. Pleadings and evidence examined and found to support the judgment.

ERROR from the district court for Box Butte county.
Tried below before WESTOVER, J. *Affirmed.*

W. G. Simonson, for plaintiff in error.

Wm. Mitchell, contra.

DUFFIE, C.

William Behnke, the plaintiff in the district court, alleged that he was the owner of a horse which Merunde sold for him as his agent for the sum of \$50; that no part of said money had been paid over by his agent except the sum of \$6.50, and he asked judgment for the sum of \$43.50. The answer was a general denial. The jury returned

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a verdict in favor of the plaintiff below for \$27.10. The motion for a new trial was overruled and judgment entered upon the verdict and the case brought here by petition in error.

The plaintiff in error argues the case in this court upon the theory that the action was in tort for the conversion of a horse. In his brief he states that the petition filed in the district court contained the following allegation: "That on or about the first day of February, 1895, the said defendant borrowed a horse from this plaintiff and on or about June, 1898, said defendant sold and delivered said horse to one John Herline for the sum of \$50 without the consent or knowledge of this plaintiff, and unlawfully and wrongfully converted said sum to his own use and benefit except the sum of \$6.50 which he paid plaintiff, to the damage of plaintiff in the sum of \$43.50."

We can find no such statement in the petition. On the contrary the petition distinctly alleges that Merunde sold to John Herline one of the defendant's horses for the sum of \$50 with the consent and knowledge of the plaintiff, and unlawfully and wrongfully converted the money to his own use except the sum of \$6.50, and judgment is prayed for the balance. We have examined the record carefully. The instructions are unobjectionable, and while, perhaps, we would have differed from the jury in the conclusion arrived at from the evidence in the record, still we can not say that the verdict is not supported by the evidence. We therefore recommend that the judgment of the district court be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

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**E. D. HAINES & COMPANY, APPELLANT, v. BANKS STEWART
ET AL., APPELLEES.**

FILED JULY 1, 1902. No. 11,536.

Commissioner's opinion. Department No. 1.

1. **Attachment: INTERVENTION AND DETERMINATION OF OWNERSHIP.** The mere fact that a party claims to be the owner of attached property, does not give him the right to intervene in the attachment, and thus have the question of his ownership determined in the attachment suit. *Kimbrow v. Clark*, 17 Neb., 403.
2. **Attachment: VOLUNTARY SUBMISSION OF QUESTION OF OWNERSHIP.** This rule does not preclude the parties from voluntarily appearing and presenting the issue of ownership under the title of the original action, and when jurisdiction is thus acquired, and a trial had without objection, it is the duty of the court to enter a judgment on the merits.
3. **Attachment: OWNERSHIP OF PROPERTY: EVIDENCE: SUFFICIENCY.** Evidence examined, and *held* sufficient to support a decree in favor of plaintiff to the amount of the judgment lien.

APPEAL from the district court for Box Butte county.
Tried below before WESTOVER, J. *Reversed with directions.*

W. G. Simonson, for appellant.

R. C. Noleman and *B. F. Gilman*, *contra*.

DAY, C.

On June 16, 1899, E. D. Haines & Co. commenced this action in the district court for Box Butte county, against Banks Stewart, to recover upon a written obligation, for the payment of money, executed by the defendant to the plaintiff. On the same day the plaintiff also caused an attachment to be issued out of said court upon the ground of the non-residence of the defendant and levied the same upon lot 16 in block 15, in the city of Alliance.

Stewart being a non-resident, service was made by publication, the notice requiring him to answer on or before

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August 21, 1899. On October 14, 1899, George L. Thorp filed a pleading in said action, which he termed a "petition of intervention," in which he alleged that on June 10, 1899, he purchased of said Banks Stewart lot 16 in block 15, in the city of Alliance, for the consideration then paid of \$1,500; that in pursuance of the purchase and the payment of the purchase price as aforesaid, Banks Stewart and his wife on June 12, 1899, executed and delivered to said petitioner a warranty deed for the premises above described; that said deed was duly filed for record in the office of the county clerk of Box Butte county, Nebraska, on June 20, 1899, and duly indexed and recorded as required by law; that at the time of the issuance and levy of the attachment in this action the petitioner was in fact and in law the owner of said premises and that the defendant, Stewart, at the time of the issuance and levy of the attachment, had no title, claim nor interest in or to said premises. Petitioner prayed that the attachment be declared null and void and to be no lien upon the premises and that he be adjudged the owner of said property and that the title to the land be quieted in him as against the claim or lien of the plaintiff.

On December 20, 1899, default was entered against the defendant, Stewart, and a judgment rendered in favor of plaintiff for \$626.50 against the interest of the said Stewart in and to the attached premises, and special execution was ordered to satisfy the said judgment.

On December 21, 1899, the court ordered that the plaintiff answer the petition of intervention within thirty days and that the intervenor reply within thirty days. Pursuant to this order the plaintiff filed an answer to the petition of intervention, alleging the levy of the attachment on the premises, the obtaining of the judgment, and that the deed made by defendant, Stewart, to the intervenor was without consideration and was made for the purpose of hindering and delaying the plaintiff in the collection of its judgment, and denied generally the allegations of the petition of intervention and prayed that

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the deed from Stewart to intervener be set aside and held for naught; that it be decreed in fraud of the rights of the plaintiff; that plaintiff have a decree ordering said premises sold to satisfy its judgment, and for general and equitable relief. No reply was filed.

On March 26, 1900, the cause was tried to the court upon the issues raised by intervener's petition and the plaintiff's answer thereto. At the close of the evidence, upon behalf of the intervener, the plaintiff moved the court for judgment. This motion was sustained. No formal judgment appears to have been entered based upon this ruling. On the following day, it still being one of the days of the regular March term, the court, on its own motion, entered an order as follows: "The court after due deliberation and consideration withdraws its ruling on the above motion, and upon its own motion, dismisses the petition of intervention at the costs of the intervener, to which ruling the plaintiff excepts."

The plaintiff then filed a motion for a new trial, alleging (1) error of the court in "dismissing this cause after having allowed Thorp to intervene," and (2) error in "dismissing intervener's petition." The motion for a new trial was overruled. From this judgment the plaintiff brings the case to this court on appeal.

No doubt the action of the court in dismissing the petition of intervention was based upon the provisions of our Code of Civil Procedure, that the mere fact that a party claims to be the owner of attached property, does not give him the right to intervene in the attachment suit and thus have the question of his ownership determined therein. *Kimbrow v. Clark*, 17 Neb., 403. This rule, however, does not preclude the parties from voluntarily presenting the issues of ownership under the title of the original action. In the case now before us, it appears that after the attachment suit had been disposed of, the plaintiff joined issue with the intervener for the purpose of determining the superiority of their respective claims. This mode of procedure was some-

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what irregular and informal, but no objection was raised to it upon that ground. The court had jurisdiction of the subject-matter and of the parties, and we see no good reason why the ultimate rights of the parties might not be determined in the original action. The practical effect of this procedure was the same as though the plaintiff had filed a creditor's bill based upon his attachment and judgment. After voluntarily going into court and tendering an issue to the plaintiff's answer, and after a trial of the issues, the intervener could not retire and thus defeat the plaintiff's right to have the issues thus tendered adjudicated.

It will serve no good purpose to review the testimony offered by the intervener in support of his claim. Suffice it to say that we have all read the record, and, in our opinion, the good faith of the transaction between intervener and Stewart is extremely doubtful. The delivery of the deed before the attachment is not made out to our satisfaction. The trial court should have rendered a decree in favor of the plaintiffs to the amount of their judgment, making it a first lien upon the lot and ordering the premises sold to satisfy the judgment, the remainder, if any, to be paid to intervener.

We therefore recommend that the judgment of the district court be reversed and the cause remanded with directions to enter a decree for the plaintiffs in accordance with this opinion.

HASTINGS and KIRKPATRICK, CC., concur.

The judgment of the district court is reversed and the cause remanded with directions to enter a decree for the plaintiffs in accordance with this opinion.

REVERSED WITH DIRECTIONS.

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CHARLES A. MORRILL V. RUTH MCNEILL.

FILED JULY 1, 1902. No. 11,550.

Commissioner's opinion. Department No. 1.

Trial: WITHDRAWAL FROM JURY OF MATERIAL ISSUE OF FACT. A party to an action is entitled to have his theory of the case, when supported by the pleadings and evidence, submitted to the jury; and it is error for the trial court to withdraw from the jury the consideration of a material issue of fact.

ERROR from the district court for Logan county. Tried below before GRIMES, J. *Reversed.*

Wilcox & Halligan, for plaintiff in error.

Hoagland & Hoagland, *contra.*

KIRKPATRICK, C.

This is a replevin action brought by plaintiff in error against Allen McNeill, Ruth McNeill and others, in the district court for Logan county on January 19, 1892, to recover possession of a large amount of personal property, consisting of farm machinery, horses, harness, wheat, corn, etc. During the time the sheriff was removing the property described in the writ from the premises of the McNeills, a settlement of the entire matter in controversy was effected between Allen McNeill, claiming to represent his wife as well as himself in making such settlement, and plaintiff in error. By the terms of this settlement plaintiff in error was to retain a certain amount of the personal property replevied, for which Allen McNeill executed a bill of sale, which he signed and to which he also signed the name of his wife, Ruth, by himself as agent. Plaintiff in error was to turn over to Allen McNeill a considerable amount of the property replevied, consisting of one team, the farm machinery and one hundred bushels of corn and an equal amount of wheat. It was agreed that he should, in payment for that portion of the

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property which he retained, credit on the note of Allen McNeill under which he brought his replevin action the sum of \$801.45. The agreement then entered into seems to have been carried out by plaintiff in error. A credit of \$801.45 was made on the note signed by Allen McNeill, which left a balance of between \$200 and \$300 on the indebtedness. For this sum Allen McNeill gave a new note secured by a certain collateral note which he had. Plaintiff in error credited the note which he held against Allen McNeill with the sum agreed upon, surrendered the note to him, and released of record the chattel mortgage securing the note under which he claimed right to the possession of the personal property in the replevin action. At the next succeeding term of court in that county, in September, 1892, the replevin action was dismissed in accordance with the agreement of the parties. About two years afterward, and in 1894, defendant in error, Ruth McNeill, made an application to set aside the order of dismissal of the replevin action and for a reinstatement of the case. This application was heard in the district court, the dismissal was set aside, and from the order setting aside the dismissal plaintiff in error prosecuted error proceedings to this court, the opinion of this court being reported in 1 Neb. [Unof.], 651, 91 N. W. Rep., 601. At the April term in 1897, of the district court in that county, the dismissal of the replevin action was finally set aside, the cause reinstated, and the case set for trial. On the 12th day of September, 1899, plaintiff in error, by leave of court, filed a supplemental petition in the replevin action, pleading, in substance, that after the sheriff had taken possession of the personal property of defendants in error under the writ of replevin, a full and complete settlement of all matters in controversy was had, setting up the conditions of such settlement; that plaintiff in error had fully complied with all the agreements and conditions of such settlement on his part to be kept and performed; that he had released his chattel mortgage and had credited on the note of Allen McNeill, \$801.45, less

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and wheat at the time he instituted the action, he has offered no proof to sustain said allegation in the trial of the cause, and has abandoned his claim that he at the time the suit was instituted was the owner of the property, and now claims through his supplemental petition, that shortly after the beginning of the suit and about the 22d of January, 1892, that the plaintiff by his attorneys and the defendant, Allen McNeill, and Ruth McNeill by her agent, made a full and complete settlement of all matters in dispute between them involved in this action. That it was agreed by the plaintiff and defendants, that the plaintiff should keep of the property taken in the replevin suit, among other property, 522 bushels of wheat and 600 bushels of corn; that by the terms of said settlement the plaintiff was to credit a note which he at the time held against the defendant, Allen McNeill, the sum of \$801.45, that the plaintiff did credit said note that amount, less a certain sum for costs in the action and taxes due on the property. That according to the terms of said stipulation, plaintiff returned to the defendants certain of the property taken, a part of which property so returned, it is alleged, were one hundred bushels of said wheat and one hundred bushels of said corn. That the plaintiff further released a chattel mortgage which he held on the same securing said note; that defendants received and retained the property returned to them, knowing that the mortgage was released and that said credit had been placed on the note.

"5. The undisputed testimony shows that the defendant, Ruth McNeill, at the time the suit was begun and at the time of the alleged settlement and bill of sale by her husband, owed the plaintiff nothing; that she was not a party to the note or mortgage mentioned in the supplemental petition of the plaintiff; neither is there any proof to show that the said wheat and corn were ever mortgaged to secure the said note; nor is there any testimony tending to show that the alleged indebtedness held by the plaintiff against the defendant, Allen McNeill, was in any way

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related to or connected with the separate property or business of the wife, Ruth McNeill; so that the question you are called upon to determine in this suit is, whether or not the wheat and corn were the property of the defendant, Ruth McNeill, or the other defendant, Allen McNeill. If the wheat and corn were the property of the defendant, Ruth McNeill, or if any part of the same was hers, then her husband under the proof in this case had no authority or legal right to convey the same to plaintiff in satisfaction of his individual debt to plaintiff, and the defendant, Ruth McNeill, would be entitled to have returned to her the wheat and corn, or such part thereof as was her separate property, or in case a return could not be had, then a judgment against the plaintiff for the value of the same. On the other hand, if the wheat and corn were the property of Allen McNeill, you will find for the plaintiff, since he, Allen McNeill, conveyed the same to the plaintiff by the bill of sale offered in evidence."

It is apparent that the only question submitted to the jury was that of the right to the possession of the property as between plaintiff in error and the defendants in error at the time the replevin action was instituted. No evidence was offered by plaintiff in error upon the merits of the controversy as presented at the commencement of the action, but the supplemental petition and all the evidence offered by plaintiff in error related solely to the settlement. It is, therefore, clear that the issue presented by plaintiff in error in his supplemental petition, and supported by the evidence offered by him, is entirely taken from the consideration of the jury. We do not express an opinion as to the weight of the evidence offered by plaintiff in error tending to establish the settlement pleaded, or tending to establish the authority of Allen McNeill to represent his wife in such settlement; nor upon the evidence tending to show that the wife had full knowledge of the terms of such settlement, and accepted the benefits thereof, failing to question it for more than two years after it was consummated. But we do say that sufficient competent

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evidence was offered by plaintiff in error and received by the trial court to require the submission of the question under proper instructions to the jury. The rule is well settled in this state that a party is entitled to have his theory of a case, if it is supported by the pleadings and proof, submitted to the jury. *Hayden v. Frederickson*, 59 Neb., 141; *Shull v. Barton*, 58 Neb., 741. In taking the question regarding the validity of the settlement from the jury the trial court erred.

Other questions are presented regarding the admissibility of certain evidence, but inasmuch as these difficulties are not apt to recur, they will not be considered. For error of the trial court in withdrawing from the jury the question as to the existence and validity of the settlement pleaded, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings.

HASTINGS and DAY, CC., concur.

REVERSED AND REMANDED.

BENJAMIN GATHERCOLE, APPELLANT, v. RUFUS H. PECK ET AL., APPELLEES.

FILED JULY 1, 1902. No. 11,591.

Commissioner's opinion. Department No. 1.

Principal and Agent: SUFFICIENCY OF EVIDENCE TO ESTABLISH AGENCY.

Evidence examined, and *held* sufficient to establish that the *Globe Investment Company* in the collection of the principal sum due upon the loan was the agent of the plaintiff.

APPEAL from the district court for Dawson county.
Tried below before GRIMES, J. *Affirmed.*

Harrison & Pearne, for appellant.

G. W. Fox and *James T. Burney*, *contra*.

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DAY, C.

This action was commenced by Benjamin Gathercole in the district court for Dawson county to foreclose a mortgage. The defense interposed was payment to the Globe Investment Company which it was alleged was the agent of the plaintiff. The allegations of the answer were denied by the reply. From a finding and decree in favor of the defendants, plaintiff has appealed.

The facts out of which the controversy arises are substantially as follows: On September 6, 1889, Rufus H. Peck and his wife, for a valuable consideration, executed and delivered to the Globe Investment Company of Boston, Massachusetts, their certain coupon bond for the sum of \$1,400 due September 1, 1894, principal and interest payable at the office of the Globe Investment Company, Boston, Massachusetts. The interest was payable semi-annually and was evidenced by ten coupons attached to the bond. To secure the payment of this debt, Peck and his wife executed and delivered to said company a mortgage upon certain lands situated in Dawson county, Nebraska, which is the mortgage now sought to be foreclosed. In August, 1892, the lands covered by the above described mortgage were conveyed by Peck and his wife to the defendant, Jonathan Famuliner, who assumed the payment of the bond and mortgage together with the interest thereon.

On April 5, 1892, the plaintiff purchased from the Globe Investment Company the above described bond and mortgage. The bond was indorsed to the order of the plaintiff without recourse on the Globe Investment Company and an assignment of the mortgage to the plaintiff was duly made and acknowledged. The assignment of the mortgage was never recorded and no notice was ever given to the maker of the bond or to Famuliner that plaintiff had purchased the bond and mortgage. Upon the back of said bond was also indorsed a guarantee of payment which we do not set out as we deem it unimportant to a determination of the case.

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On August 25, 1894, Famuliner sent a draft to the Globe Investment Company for the full amount due upon the bond and mortgage. This draft was by the direction of the Globe Investment Company sent to its Kansas City office and by that office remitted to the home office in Boston, and properly entered on its books on August 30, 1894. The Globe Investment Company failed in 1895 without having accounted to the plaintiff for the money thus collected. When the bond became due the Globe Investment Company instead of remitting the amount to Johnson, remitted only the interest. As to what excuse was offered why the entire amount was not remitted does not appear, but Johnson accepted the interest and made no further investigation of it.

A number of questions are argued in the brief of counsel arising upon the effect to be given to the guarantee indorsed upon the bond, especially as to whether it transferred the entire title to the bond to the plaintiff, but as we have reached the conclusion that the evidence is sufficient to establish that the Globe Investment Company was the plaintiff's agent in the collection of the principal sum, we will not consider the other questions discussed.

The testimony shows that one T. F. Johnson, of Colebrook, New Hampshire, who was a stockholder in the Globe Investment Company, had negotiated sales to his "clients and customers" of a large amount of bonds and mortgages held by that company, in all amounting to between thirty and forty thousand dollars, and that he negotiated the sale of the bond and mortgage in question to the plaintiff; that immediately thereafter the plaintiff delivered the possession of the papers to Johnson, as his agent, who thereafter collected the interest as it became due and gave the business such attention as it required; that he retained the possession of the bond and mortgage and had them in his possession at the date of the payment to the Globe Investment Company and for a long time thereafter. After turning the papers over to Johnson the plaintiff gave the matters no further attention except to receive from the hands of Johnson the interest from time

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to time, one of which payments was made after the loan became due and which would indicate that the defendants were delaying the payment of the principal sum.

It seems a fair deduction from the evidence that Johnson was the plaintiff's agent to collect the interest as well as the principal of this loan. It also appears that Johnson transacted the business of collecting the interest as well as the principal upon loans for his clients and customers through the Globe Investment Company, and that all of the correspondence with borrowers relating to collection of principal and interest or renewal of loans was made by the Globe Investment Company in all instances where the company had guaranteed its loans and in this case the entire business was carried on by the Globe Company with the knowledge and acquiescence of Johnson. Not only was he a stockholder in the company but had repeatedly been at its office and knew its methods of business and that it undertook to collect the principal of all its guaranteed loans direct from the borrowers, and that it would do so in this instance unless otherwise instructed.

Johnson did not correspond or communicate with the debtor himself but imposed that duty upon his agent, the Globe Investment Company. The company understood from its course of dealing with Johnson that it had authority to make such collections and acted upon that understanding with the knowledge of Johnson. One of the officers of the company swears that: "All the Globe Company's loans were sold with the understanding that they would be cared for in the same way after the sale as they had been previously."

After an examination of the record we conclude that the evidence was sufficient to show that the Globe Investment Company was the agent of the plaintiff in the collection of the principal debt of this loan. We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

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**MCCORMICK HARVESTING MACHINE COMPANY V. C. FRANK
PREITAUER.**

FILED JULY 1, 1902. No. 11,670.

Commissioner's opinion. Department No. 1.

1. **Chattel Mortgage Foreclosure: DAMAGES FOR FAILURE TO COMPLY WITH STATUTE.** Where a mortgagee, in the foreclosure of his mortgage, fails to comply in an essential particular with the requirements of the statute, he will be liable to the mortgagor for any damages the latter may thereby sustain.
2. **Chattel Mortgage Foreclosure: SALE IN FOREIGN COUNTY: FILING MORTGAGE: STATUTE.** By the provisions of section 6, chapter 12, Compiled Statutes, 1899, before mortgaged chattels can be sold in a county other than that in which the mortgage was originally filed, the mortgage must be filed in the office of the county clerk of the county where the property is to be sold.
3. **Chattel Mortgage Sale in Foreign County Where Mortgage Not Filed: LIABILITY OF MORTGAGEE.** Where a mortgagee takes mortgaged property to another county and there sells it without first filing his mortgage in such other county, the mortgagor may maintain an action against the mortgagee, and recover the value of the property taken less the amount of the debt due to the mortgagee.
4. **Chattel Mortgage Foreclosure: EVIDENCE SUFFICIENT.** Evidence examined, and found to sustain the findings and judgment of the trial court.

ERROR from the district court for Dawson county.
Tried below before GRIMES, J. *Affirmed.*

O'Neill & Gilbert, E. A. Cook and W. D. Giffin, for plaintiff in error.

The parties to a chattel mortgage contract may contract as they see fit and may agree that the statutory method of foreclosure need not be adhered to. *Lexington Bank v. Wirges*, 52 Neb., 649.

In its brief in support of a motion for a rehearing, which was denied, plaintiff in error cited the following authorities:

A mortgagee of chattels in the foreclosure of his mortgage must comply substantially with the requirements of

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the statutes, where they have not been waived by the mortgagor. *Cullen v. Rose*, 47 Neb., 638; *Chaffee v. Atlas Lumber Co.*, 43 Neb., 224; *Faeth v. Leary*, 23 Neb., 267; *Buffalo County National Bank v. Sharpe*, 40 Neb., 123.

A chattel mortgage is good between the parties even though it is oral. *Conchman v. Wright*, 8 Neb., 1; *Sparks v. Wilson*, 22 Neb., 112; *Lerington Bank v. Wirges*, 52 Neb., 649; *Buckstaff Bros. Mfg. Co. v. Snyder*, 54 Neb., 538.

H. S. Ridgely and H. D. Rhea, contra.

KIRKPATRICK, C.

This action was instituted as one in replevin in the county court of Dawson county. The property, the subject of controversy herein, had been seized by plaintiff in error under certain chattel mortgages held by it, and was retaken on the writ of replevin in the case at bar; but on failure of defendant in error to furnish a bond, the property was returned to plaintiff in error and the action proceeded as one for damages. The cause was tried to the county court, resulting in a judgment for defendant in error, from which an appeal was prosecuted to the district court, where the cause was tried to the court, a jury having been waived, resulting in a judgment for defendant in error, from which error is prosecuted to this court.

The trial court found that defendant in error was the owner and entitled to the possession of the property at the time the action was brought; that the property taken by plaintiff in error was of the value of \$300. Of the property taken, \$280 in value was covered by the mortgages of plaintiff in error, and one steer of the value of \$20 was not included in the mortgages. The court further found that there was due on the mortgages held by plaintiff in error the sum of \$159.53, and gave defendant in error a judgment for the sum of \$140.47, with interest thereon, making a total of \$143.74, being the difference in value of the property taken by plaintiff in error and the amount at that time due on its several mortgages. Among other

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things the court found that the mortgages of plaintiff in error were due and unpaid at the time it seized the property, and that the act of plaintiff in error in taking the property in the manner pleaded, was the act of a trespasser.

Plaintiff in error contends that the following questions are presented by the record: (1) Who was entitled to the possession of the stock at the time it was taken into possession by the defendant (plaintiff in error); (2) Did the circumstances attendant upon the taking possession of the stock by defendant make it a trespasser, and deprive it of the rights granted by the mortgagees; and (3) the rule of damages to be applied. It is disclosed by the record that defendant in error, who resided in Lincoln county, had given mortgages to plaintiff in error covering a McCormick binder, a span of horses and some cattle. Some time after the mortgages were due, plaintiff in error sent one John Strahle, a constable of Dawson county, who was a defendant in the suit below, but who appears not to have been brought into this court, to the farm of defendant in error for the purpose of foreclosing the mortgages. Defendant in error forbade the constable, who was not within the county of his jurisdiction, from taking any of the stock under the mortgages, and refused to permit him to take the property, notifying him and warning him not to do so, and informed him that he was required to take the property, if at all, in accordance with law. Strahle insisted upon his right to take the property under the mortgages, and proceeded to do so; opened the corral gate and drove the stock out and away from the place of defendant in error, the latter all the while protesting against his action. The property was taken to the village of Gothenberg, in Dawson county, and there sold. Whether it was advertised as required by law, or sold at private sale, does not appear from the record. The mortgages which had been executed by defendant in error contained a provision authorizing the mortgagee to sell at private sale, and also named as the place of sale, Gothen-

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berg, in Dawson county. The chattel mortgages seem to have been filed in Lincoln county, in which defendant in error resided, but do not appear to have been filed in Dawson county prior to the sale of the property or at any other time.

There can be no doubt that Strahle, at the time he took the property, was a trespasser. He had no authority to break into the corral of defendant in error and forcibly take his property. If such proceedings were in any manner countenanced by the courts, it would amount to an invitation to citizens to resort to force rather than to the courts of justice for a settlement of property disputes. However, the effect of this action of the constable upon the rights of plaintiff in error under the mortgages held by it need not be determined in this proceeding. In accordance with the provisions of section 6, chapter 12, Compiled Statutes, 1899, it was the duty of plaintiff in error, before selling the property which it had taken under its mortgages and removed to Dawson county, to have had its mortgages filed in the office of the county clerk of that county where it proposed to make the sale. This was a condition precedent to its right to make the sale.

In the case of *Loeb v. Millner*, 21 Neb., 392, it was said: "A sale by the mortgagee under the statute, in which he fails to comply with any essential requirement of such statute will render him liable to the mortgagor for damages which the latter may thereby sustain."

"A provision in the mortgage that the mortgaged property may be sold in a county other than that in which the mortgagor resides does not waive the statutory requirement that the mortgage is to be filed in the county where the sale is to take place."

In the case at bar, under the terms of the mortgages, plaintiff in error would probably have the right to take the property to Gothenberg, and there have it sold; but it would have no right to sell the property in Dawson county without first filing its mortgages in that county. *Ward v. Watson*, 24 Neb., 592, 595.

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Again, it is contended that the trial court erred in permitting defendant in error to recover the value of the property alleged to have been converted less the amount due on the mortgages held by plaintiff in error. This contention can not be sustained.

In the case of *Callen v. Rose*, 47 Neb., 638, it is said: "A mortgagee of chattels in the foreclosure of his mortgage must comply substantially with all the requirements of the statute, where they have not been waived by the mortgagor, and if the mortgagee fails to do so in an essential matter, he is liable to the mortgagor for the value of the property, less the mortgage lien thereon."

The judgment of the trial court in the case at bar seems exactly in line with the decision quoted. The trial court must have found that plaintiff in error failed in an essential particular to comply with the law regarding the foreclosure of its mortgages, and that it was, therefore, guilty of the conversion of the property of defendant in error. It is not contended that the value of the property fixed by the trial court is not amply sustained by the evidence. It is clear that plaintiff in error wrongfully took possession of the property in the first instance, and, secondly, that it failed to comply with the law in the matter of filing its mortgages in Dawson county, where it sold the property. In fact, it is conceded that a part of the property which it converted was not included in its mortgages. It seems very clear that justice has been done in the premises. The judgment of the trial court is right, and it is therefore recommended that the same be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

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SARAH A. ALLYN V. MARY COLE.

FILED JULY 1, 1902. No. 11,728.

91 NW 505
Commissioner's opinion. Department No. 2.

Attachment: PROPERTY IN POSSESSION OF STRANGER: REDELIVERY BOND:
TRIAL OF RIGHT OF PROPERTY: STATUTES. A stranger to an attachment suit, in whose possession the attached property is found, who gives a redelivery undertaking under section 930, Code of Civil Procedure, can not thereafter assert ownership and try the right of property under sections 945 and 996.

ERROR from the district court for Custer county. Tried below before SULLIVAN, J. *Affirmed.*

James Ledwich, for plaintiff in error.

Rhea & Fleharty and *R. E. Brega*, *contra.*

POUND, C.

Mary Cole brought suit against Virgil Allyn and others before a justice of the peace and attached property found in the possession of Charles H. Allyn as guardian of Sarah A. Allyn. Thereupon the latter gave a redelivery undertaking under section 930, Code of Civil Procedure, and the property was turned back to him. Afterwards said Sarah A. Allyn, by her said guardian, gave notice that she claimed the property as her own and proceeded to try the right of property under sections 945 and 996 of the Code. She had judgment in justice's court, but upon petition in error in the district court that judgment was reversed and the proceeding was dismissed. We think the district court was right. By giving the bond the party in whose possession the property was found elected to treat the property as that of the defendant in the suit. Giving the bond would not prevent her from attacking the attachment itself. *Hilton v. Ross*, 9 Neb., 406; *Wilson v. Shepherd*, 15 Neb., 15. But it necessarily operated to prevent any assertion of ownership on her part. Having covenanted

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that the property should be forthcoming to answer the judgment of the court, she could, consistently with her agreement, proceed to obtain a judgment for the defendants. To claim that the property which she had agreed to produce for the satisfaction of the judgment was hers, and therefore not subject thereto, would be entirely inconsistent with her undertaking and in contravention thereof. Hence it has been held repeatedly under statutes such as ours that the person from whose possession property is taken by attachment may give a redelivery bond and recognize the property as that of the attachment debtor, confining himself to such defense as the latter may make, or may claim it as his own by replevin or other appropriate proceeding. If he elects the former course, he cannot claim the property as his. *Hartun v. Sizer*, 23 Kan., 310; *Wolf v. Hahn*, 28 Kan., 588; *Case v. Steele*, 34 Kan., 90; *Staples v. Filmore*, 43 Conn., 510; *Pierce v. Whiting*, 63 Cal., 538; *People v. Reeder*, 25 N. Y., 302. These cases are cited with approval in *Cooper v. Davis Mill Co.*, 48 Neb., 420, 425, where the court points out that the statutes involved were similar to ours. In *Hartun v. Sizer* and *Wolf v. Hahn*, the same course was attempted as in the case at bar, and it was held that the execution of the undertaking and redelivery of the property precluded such proceedings. In *Case v. Steele* the court said: "When Case, Bishop & Co. gave the forthcoming bond, they virtually admitted, by giving such bond, that the property belonged to Doty Bros. & Co., and was subject to the levy made upon it by the sheriff, and virtually abandoned all claim which they might have had to the property under their chattel mortgage; otherwise, they should not have given the bond, but should at once have filed their interplea, or commenced an action of replevin for the property, or commenced an action in the nature of trover for damages." In *Cooper v. Davis Mill Co.*, 48 Neb., 420, this court held that one who had given such an undertaking could not claim to own the property when sued thereon. The question whether ownership could be claimed in some other proceeding was not

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considered. But the reason which the court assigns for its ruling covers the point left open no less than that which was decided. The question has been settled repeatedly in other jurisdictions under like statutes, and we see no ground for doubt.

It has been suggested that Mrs. Allyn is not bound by the act of her guardian in giving the undertaking. But he had the management of her estate under section 16, chapter 34, Compiled Statutes, as well as the duty of representing her in legal proceedings under section 23. The proceeding to try the right of property was his act, though brought in her name. Persons under disability who have guardians to represent them are as much bound by the established rules of law and legal procedure in the proceedings which their guardians institute for them as other litigants.

We recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

FOSTER & SMITH LUMBER COMPANY V. T. A. LEISURE,
SHERIFF OF CUSTER COUNTY.

FILED JULY 1, 1902. No. 11,773.

Commissioner's opinion. Department No. 3.

1. **Taxation: EXTENT OF PERSONAL PROPERTY LIEN: TIME WHEN LIEN BECOMES FIXED.** Taxes, assessed on personal property, are a lien, not only on the personal property assessed, but on all such property subsequently acquired, from the time the tax-list is delivered to the county treasurer, and subsequent purchaser of such property takes it subject to such lien.
2. **Replevin: JUDGMENT BROADER THAN VERDICT: VALIDITY.** A judgment in replevin, which is broader than the verdict, is erroneous.

ERROR from the district court for Custer county. Tried below before SULLIVAN, J. *Reversed with directions.*

J. B. Smith, for plaintiff in error.

L. E. Kirkpatrick, contra.

ALBERT, C.

This is an action of replevin, brought by Foster & Smith against T. A. Leisure, to recover possession of certain office furniture and lumber. The plaintiff alleges absolute ownership and right of possession. The defendant claims a lien on the property by virtue of a levy thereon made by him under a distress warrant, directed to him, as sheriff of Custer county, commanding him to collect certain personal taxes for the years 1894, 1897 and 1898, of one W. C. Bedwell. The jury found that at the commencement of the action the plaintiff was the owner and entitled to the possession of the lumber; as to the remainder of the property, it found in favor of the defendant and fixed the value of interest therein at the sum of \$94.67 and the value of the property at \$75. The court rendered judgment against the plaintiff for 'the return of the whole of the property, or, in case return thereof could not be had, for the value thereof. The plaintiff brings error.

It is conclusively established by the evidence that on the 28th day of December, 1897, the plaintiff purchased the office furniture in question, and certain lumber, of the said W. C. Bedwell, who was then the owner of the property. At the time of the transfer of this property by Bedwell to the plaintiff, his personal taxes for the year 1894, at least, were delinquent. It is claimed by the defendant that the plaintiff took the property subject to the lien of the taxes for that year. As against this contention the plaintiff insists, first, that by virtue of the provisions of section 139, article 1, chapter 77, such taxes become a lien only from and after the time the tax-books are received from the clerk by the treasurer, and that there is no evidence showing when the tax-books for the year 1894 were received by the treasurer, consequently, there is a failure to show that the taxes for that year were a lien on the property at the time of the transfer of the property to the plaintiff; second, that such lien ought not to prevail against transfers of the property in the regular course of business. As

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to the first proposition, the warrant of the clerk directing the treasurer to proceed to collect the taxes for the year 1894, attached to the tax-books of that year, bears date of January 4, 1895. It appears in evidence that the first receipt for taxes, for the year 1894, was given by the treasurer January 8, 1895. From these two facts we think it is clear, and the court had a right to assume, that the tax-books were delivered to the county treasurer not later than January 8, 1895, and the lien thereof attached to the personal property of Bedwell from and after that date. As to the second proposition, section 139, *supra*, is as follows: "The taxes assessed upon personal property shall be a lien upon the personal property of the person assessed, from and after the time the tax-books are received by the collector." In *Farmers Loan & Trust Co. v. Memminger*, 48 Neb., 17, it was held that the lien of personal taxes is superior to the lien of a chattel mortgage executed after the delivery of the tax-books to the county treasurer. In *Reynolds v. Fisher*, 43 Neb., 172, it was held that personal taxes are a lien from the delivery of the tax books to the treasurer, not only on the personalty assessed, but on all personal property subsequently acquired by the taxpayer, and that the lien for such taxes is superior to the lien secured by chattel mortgages thereon, executed after the tax-books have come into the hands of the county treasurer. We can discover no difference in principle between a mortgage of such property and an absolute sale thereof. If the purchaser of a part of the interest of the taxpayer in the property takes it subject to the lien for taxes, on what theory can it be claimed that the purchaser of the entire interest takes it free from such lien? In our opinion the question answers itself. That the statute, thus construed, may hamper the transfer of personal property is true. But that is a matter for the legislature. As to the taxes for the year 1897, there is no evidence that the tax-books had been received by the treasurer before the sale to the plaintiff. As to the taxes for 1898, the evidence is conclusive that the property was transferred to the plaintiff before the tax-lien

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had attached. But as the taxes for the year 1894, with accrued interest and costs, are sufficient to warrant the verdict, the taxes for the other years may be omitted from our consideration. On the undisputed facts the defendant was entitled to a verdict for the property awarded to him by the jury; hence, whatever error there may have been in the course of the trial, in the instructions given or in the refusal to give those tendered by the plaintiff, is error without prejudice.

It will be observed, however, that while the jury found for the defendant as to part of the property only, and for the plaintiff for the remainder, the judgment of the court is in favor of the defendant for the whole. The judgment is obviously erroneous.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded with directions to enter a judgment in conformity with the verdict of the jury.

AMES and DUFFIE, CC., concur.

The judgment of the district court is reversed, and the cause remanded with directions to enter a judgment in conformity with the verdict of the jury.

REVERSED WITH DIRECTIONS.

O. E. MARTIN v. RICHARD CONNELL.

FILED JULY 1, 1902. No. 11,792.

Commissioner's opinion. Department No. 1.

1. **Evidence:** IMMATERIAL TO ISSUES. Certain evidence tendered by plaintiff held properly excluded as not material under the issues of the case.
2. **Appeal and Error:** INSTRUCTIONS DEFECTIVE IN MATTERS NOT COMPLAINED OF. Instructions which, as a whole, fairly submit the matter in controversy, will not require a reversal though defective in some respects not complained of.

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ERROR from the district court for Dixon county. Tried below before GRAVES, J. *Affirmed.*

A. A. Welch and O. E. Martin, for plaintiff in error.

Kingsbury & McMaster, contra.

HASTINGS, C.

This was an action originally brought by one B. E. Fields in justice court of Dixon county to recover upon two promissory notes. Pending the action in justice court the present plaintiff, O. E. Martin, was substituted for Fields, on the ground that the notes in question had been, since the action was commenced, assigned to Martin. On a judgment for the defendant an appeal was taken to the district court, where another judgment was rendered against the plaintiff, who now brings error to this court.

Complaint is made of the sustaining of objections to evidence. The first is upon the question. "To whom is the money due on said second cause of action and note described therein?" This was excluded by the court. It seems unnecessary to discuss this complaint further. The answer called for was surely a general conclusion as to the merits of that cause of action. That conclusion was for the jury to draw from all the facts, not from plaintiff's mere statement.

It is next complained that objection was sustained to the question, "How is that contract called?" and the answer, "Contract Order," excluded. In this there was no prejudicial error on the part of the trial court. There were two issues in the case: one, whether or not the plaintiff owned the notes, and the other, whether or not the original owner had made a contract to supply to the maker of the notes trees to enable him to secure a living orchard on his farm. Failure to do this was the affirmative defense. The notes were admitted. The question was not material to either of these issues. The same immateriality seems to pervade all the questions asked of the witness,

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Fields, which were excluded; they seem to have no bearing upon the ownership of the notes or upon the question of damages under the alleged agreement to furnish an orchard.

It is complained that the court erred in refusing the third instruction requested by the plaintiff, as follows: "The jury are instructed that it is a rule of law that a person dealing with one known to be an agent, or claiming to be such, is bound, at his peril, to see that the agent has authority to bind his principal in such transaction, or that the agent is acting within the scope of his apparent authority." This does not seem to have been error on the part of the trial court. Whatever authority the selling agent had to agree to replace trees till a living orchard should be obtained, if the notes were obtained, as was alleged, in consideration of such a contract, its total failure could be shown in an action upon them.

Plaintiff is also complaining as to the giving of the sixth instruction. This simply told the jury that, to entitle the plaintiff to recover, he must show himself, by the preponderance of the evidence, to be the owner of the notes. This was clearly required of the plaintiff, and it was not error to so instruct the jury.

Complaint is made also of instruction No. 7, as follows: "You are instructed that if you believe from the preponderance of the evidence that the plaintiff is the owner of the notes or causes of action in controversy, and further believe that there is due thereon to the plaintiff the sum alleged in his petition, or any sum, then, before the defendant can defeat the recovery, he must satisfy you by a preponderance of the evidence of the alleged verbal agreement set forth in defendant's answer, whereby it is alleged that B. E. Fields agreed to furnish trees, replace and replant such trees as died from drouth and other causes, and when that is established he must prove by a preponderance of evidence that the said B. E. Fields failed and neglected to comply with the terms of said contract after having been requested so to do by the defendant herein, and must show

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by a preponderance of the evidence that by reason of the failure of said B. E. Fields to comply with the terms of said contract that defendant has been damaged and must prove the amount of said damage, and such damage so proven, if any, is proper to off-set against any amount which you shall find due the plaintiff, if any such be proven."

This instruction is criticised as referring to "notes or causes of action" as if they were different and distinct things. There can be no question that the jury understood that these were the same things. The use of the two terms in the instrument grew out of their use in the assignment made after the action was commenced. It is also complained that the instruction, in connection with the ones previously given, gave undue prominence to the question as to the ownership of the notes.

There were, as suggested, two issues in the case; both had been clearly indicated in the former instructions, especially the ones summarizing the pleadings. Both are distinctly mentioned in this instruction. The burden of proof as to each was clearly indicated. In view of all the instructions it is impossible to say that any undue prominence was given to either issue. Nor does it seem that the instruction can be complained of as vague, obscure or ambiguous as plaintiff contends. The meaning seems plain.

Its most serious fault is in apparently requiring some proof of an amount due upon notes, whose execution is admitted. There is no complaint in plaintiff's brief on that score. So it seems evident that it was not so understood at the trial. There being no complaint on this ground, it must be assumed that none of the parties understood that anything of the kind was required. Indeed, from the instructions as a whole, and from the complaints made of them, it seems clear that it was understood at the trial that there were only two branches of the case, the ownership of the notes, and the alleged contract to furnish a living orchard. These seem to have been fairly considered.

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It is recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

LAURA JOLLIFFE, APPELLEE, v. ROBERT A. MAXWELL ET AL.,
APPELLEES, IMPEADED WITH CLARKE LAND AND LOAN
COMPANY ET AL., APPELLANTS.

FILED JULY 1, 1902. No. 11,832.

Commissioner's opinion. Department No. 2.

1. **Mortgages: EXECUTED UPON ONE-HALF INTEREST: EFFECT ON OTHER HALF.** A mortgage executed upon a tract of land by the owner of an undivided one-half of it, creates no lien upon the undivided half owned by another without he joins in such conveyance.
2. **Mortgages: EXECUTED UPON ONE-HALF INTEREST: PARTITION: EXTENT OF LIEN.** When the property is partitioned, by a proper decree of the court, the mortgage attaches as a lien upon that portion set off to the mortgagor and his grantees, and the owner or owners of the other portion of the land take it divested of the mortgage lien.
3. **Pleading: TREATED AT TRIAL AS THOUGH FILED: APPEAL.** Where pleadings are not marked filed by the clerk, but are treated by the trial court as though they were actually filed, they will be so treated on appeal to this court.
4. **Partition: NO ALLOWANCE FOR IMPROVEMENTS: THEIR VALUE SET OFF AGAINST RENTS: PREJUDICE: REVIEW.** Where the trial court in an action for partition makes no allowance for improvements voluntarily placed on the property by a joint owner or cotenant, and it is apparent that the value of such improvements, and the rents and profits were set off against each other, it further appearing that the appellants were not injured thereby, such action presents no ground for a reversal of the judgment.
5. **Partition: EVIDENCE: PROPER ALLOWANCES FOR TAXES.** Evidence examined, and held that all proper allowances for taxes were made.

APPEAL from the district court for Douglas county.
Tried below before FAWCETT, J. *Affirmed.*

Charles S. Lobingier, for appellants.

Rich & Clapp, contra.

BAENES, C.

On the 14th day of April, 1894, Laura Jolliffe, one of the appellees herein, filed a petition in the district court for Douglas county, praying for a partition of block 21. All parties having any record interest therein, at that time, were made defendants. The defendant, Maxwell, filed an answer for himself, and for Ebenezer Archer, and one other. On the 30th day of June, following, a decree was entered granting the partition as prayed, and finding against defendant Archer in general terms. Referees were appointed by the court, who duly qualified and made their report, which was confirmed on the 3d of July, 1894. From this judgment of partition no appeal was taken, and the same was acquiesced in by all of the defendants except Ebenezer Archer, who was a non-resident and had been served by publication only. Defendant, Maxwell, however, had appeared for him, and filed an affidavit setting forth the fact that he was authorized to make such appearance. On the 5th of September, 1894, Elizabeth Craven, the principal appellee herein, purchased of Laura Jolliffe that portion of block 21 assigned to her by the referees and confirmed in her by the decree of July 3, 1894. She paid \$2,275 for the same, all of which was paid in cash, except \$575 which was secured by a mortgage upon the property. In February, 1897, the defendant, Archer, who was at all times a non-resident of this state, filed a motion to vacate and set aside the decree in partition theretofore rendered, and such proceedings were had that on January 15, 1898, the court set aside the decree, opened the case, and allowed Archer to defend in said action. On September 16, 1898, an amended petition was filed making some additional parties defendant, and on November 17, following, Elizabeth Craven filed her petition of intervention setting up her ownership of the property theretofore allotted to Laura Jolliffe, stating costs of improvements made, taxes paid, etc., and praying for the protection of the court as an innocent purchaser. Febru-

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ary 15, 1899, the Clarke Land & Loan Company, one of the defendants, filed an answer and cross-petition alleging that it was the owner in trust of the undivided one-half interest formerly belonging to Maxwell; that it acquired this interest by virtue of an agreement made August 4, 1896. On the same day the Clarke Land & Loan Company filed an answer and cross-petition to the petition of intervention filed by Elizabeth Craven, denying that she was an innocent purchaser for value, and alleging certain improvements made on the Craven property by Maxwell, and certain taxes paid, praying in the alternative for the dismissal of the petition of intervention, or that the Clarke Land & Loan Company be reimbursed for the various expenditures made by Maxwell. On the same day John T. Clarke filed an answer and cross-petition setting up certain tax liens held by him; these liens were afterwards provided for in the decree, and there is no complaint by Clarke on that account. Sometime thereafter, and about the first of May, 1899, it was stipulated by the parties to the suit that Clarke might file an amendment to his answer and cross-petition, and this amendment now appears as the second cause of action therein, and is founded upon a note of \$5,400, and a mortgage securing the same, executed by William Maxwell, May 2, 1891, to one James T. Morton, maturing February 11, 1893. The words of conveyance, and description contained in this mortgage, are as follows: "All my right, title and interest in and to lots 8, 9, 12, 13 and 14, in Arcade Place, a subdivision of block 21, West Omaha addition to the city of Omaha." To these answers and cross-petitions Elizabeth Craven filed replies. Afterwards a stipulation, by all parties, was filed providing for a partition of block 21, by agreement; by the terms of this agreement the same parcel of ground was set off to Elizabeth Craven that she had purchased from Laura Jolliffe, and which had been set off to her by the former decree herein. This tract included lot 13, the north thirty-eight feet of 12, and west thirty-nine feet of north thirty-eight feet of 9, being a portion of the lots covered by the

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description contained in the Clarke mortgage. By the terms of this decree the plat of Arcade Place was declared void; the mortgage set up in the cross-petition of John T. Clarke was canceled, but only so far as it in any manner affected the rights of Elizabeth Craven and certain other of the defendants; and the Clarke Land & Loan Company was denied the right to recover for the improvements, but was allowed to recover for certain taxes paid by Maxwell. The decree also denied the right of John T. Clarke and the Clarke Land & Loan Company to recover for certain other taxes claimed by them. From so much of this decree as denied the right to a foreclosure of the mortgage in question, the right to recover for certain improvements made upon that portion of the land set off to Elizabeth Craven, and the denial of the right to recover certain of the taxes claimed by defendants, the said Clarke Land & Loan Company and John T. Clarke appealed to this court. No contention is made that the decree, in so far as it partitions the property among the several owners, is erroneous, or that the court erred in setting aside and cancelling the plat of Arcade Place.

In order to determine the rights of the appellants to recover for the improvements and taxes in question herein, and of John T. Clarke under the mortgage set forth in his answer and cross-bill, it is necessary for us to make a statement of the facts as they appear of record, and which are as follows: One William Maxwell bought block 21, West Omaha, from Maurice McKelligon on the 11th day of February, 1887, and received a deed from him, which purported to convey the entire block. At that time the record title disclosed that McKelligon owned only an undivided one-half interest therein, and that the title to the other undivided half was in one Mehitable Higgins. Maxwell, however, claimed to own the whole block, and on April 11, 1887, filed a plat of Arcade Place, which was a subdivision of block 21. This plat was executed by Maxwell alone, Mehitable Higgins, the owner of the other undivided one-half interest at that time, not joining in the execution

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thereof. Maxwell then sold, or pretended to sell, a portion of the lots contained in Arcade Place to various parties, and among others he executed a deed for lot 11 to one Ebenezer Archer, who is the non-resident defendant, and who opened up the decree of July 3, 1894, and was thereafter an answering defendant in this action. In August, 1888, Maxwell filed a petition in the district court for Douglas county, making Mehitable Higgins and others parties defendant to the suit, seeking by said action to quiet the title to the whole block in himself as against all defendants. After this suit was commenced the undivided one-half interest in said block, which was owned by Mehitable Higgins, was purchased by the appellee, Laura Jolliffe, said purchase having been made on the 17th of December, 1889; on the same day Laura Jolliffe conveyed to Samuel Price an undivided one-eighth interest in the premises, and to Edward L. Sayre an undivided one-eighth interest therein. Thereafter Jolliffe, Sayre and Price intervened in the suit to quiet title, and on the 15th day of August, 1901, the court, by proper decree, confirmed their right to an undivided one-half interest therein, as above set forth. This case was taken by Maxwell to the supreme court, and the judgment of the district court was affirmed. On August 14, 1890, Price conveyed his one-eighth interest in the premises in controversy to Charles W. Smith, who is a defendant in this action.

1. The appellants contend that the court erred in its findings and decree as to the mortgage for \$5,400 now claimed to be owned by appellant, John T. Clarke, which are as follows: "The court finds that said intervener (meaning Elizabeth Craven) is entitled to hold said real estate, that is to say, the tract set off to her by the decree in partition, free and clear of all liens or claims of any and all parties to this action at the time said decree was rendered; that the mortgage owned by John T. Clarke is not a lien upon said property, but constitutes a cloud thereon, which should be removed. * * * And upon consideration of that portion of the cross-petition of John T. Clarke

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setting up the mortgage from Maxwell to Morton and the evidence, the court finds that said John T. Clarke is not entitled to recover any amount thereon. The court finds that said mortgage is an apparent lien and charge upon lot 9, Arcade Place, being tract number three, described in this decree, and that the same should be removed therefrom." The mortgage in question was executed by William Maxwell after the commencement of his suit to quiet the title to all of block 21 in himself; that action resulted in a decree of the court in which it was found and determined that the plat of Arcade Place made by Maxwell was null and void, and it was ordered and decreed that it should be set aside and held for naught. It was further adjudged in said action that Maxwell never owned more than an undivided one-half interest in said block. An appeal was prosecuted from that decree to the supreme court, where it was affirmed. It was thus settled beyond all question that William J. Maxwell, at the time he executed the mortgage, owned only an undivided one-half interest in the property. The mortgage having been executed to Morton *pendente lite*, his assignees took it charged with notice of the real interest Maxwell had in the premises. This fact, however, is not material, because Maxwell could only convey such interest in the premises as he possessed; the lien of the mortgage could attach to no more than his interest therein. One cotenant will not be permitted to do an act which will prejudice the rights of another; a sale made by one will not divest another of his interest in the common property. *People v. Marshall*, 8 Cal., 51; *Carlyle v. Patterson*, 3 Bibb [Ky.], 93; *Snead's Heirs v. Waring*, 2 B. Mon. [Ky.], 522; *Bigelow v. Topliff*, 25 Vt., 273. The mortgage in question could only bind an undivided one-half interest of the land. *Vandike's Appeal*, 57 Pa. St., 9. The general rule is that a conveyance by one joint tenant, or tenant in common, of a specific part of the property by metes and bounds to a stranger, can have no legal effect or operation to the prejudice of a cotenant. The purchaser from a tenant in common of his share de-

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fined by metes and bounds cannot require cotenants, whose title was acquired after such purchase, to take their share in the remainder of the lands. *Dennison v. Foster*, 9 Ohio, 126. A conveyance by one cotenant gives the grantee no greater rights than those held by the grantor. An undivided interest in a specific part of a single tract of land held by cotenants, as an integer, cannot be granted by the mere deed of one cotenant so as to entitle the grantee to partition of that specific part against the other cotenant. *Markoe v. Wakeman*, 107 Ill., 251. "The grantee must take therefore, subject to the contingency of the loss of the premises, if, upon the partition of the general tract, they should not be allotted to the grantor." *Stark v. Barrett*, 15 Cal., 361. It follows that the mortgage in question created no lien upon that portion of the property set off to the intervener, Elizabeth Craven; that when the property was partitioned the mortgage became a lien upon that portion of it set off to Maxwell and his grantees, and no other. The appellants being the owners of the Maxwell interest in block 21, cannot complain because the court found that they were not entitled to a lien and a foreclosure of their mortgage upon their own premises. Upon the entry of the partition decree the appellees took their share of the property divested of the lien of the mortgage executed by Maxwell. The decree of the court, so far as the mortgage in question is concerned, is right and should be affirmed.

2. It is contended, however, that no replies were filed to the answer and cross-bill of appellant, John T. Clarke, and therefore the mortgage lien was admitted, and the court erred in refusing to decree a foreclosure. The record discloses that replies were in the hands of the clerk, properly sworn to and ready for filing at the time of trial. It also discloses that the clerk's filing mark was not upon the cross-petition of appellant, Clarke. We hold that these matters are not material, because during the trial the court treated the replies as having been filed. It is the rule of this court that where pleadings are not marked filed but the trial court treats the case as though the issues were

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fully made up, it will be treated in the same manner here. *Schuster v. Carson*, 28 Neb., 612; *Loan & Trust Savings Bank v. Stoddard*, 2 Neb. [Unof.], 486, 89 N. W. Rep., 301; *Missouri P. R. Co. v. Palmer*, 55 Neb., 559; *Minzer v. Willman Mercantile Co.*, 59 Neb., 410.

3. The appellants allege that the court erred in refusing to allow them to recover the value of the improvements put upon lot 13, a portion of the tract held by appellee, Elizabeth Craven. The record shows that these improvements were put upon the premises while Maxwell was in possession thereof, and were placed there voluntarily by him. Where voluntary improvements cover the whole of the property so that one cotenant cannot have his portion of the estate set off to him without including a portion of the improvements, the tenant will not be entitled to compensation therefor, notwithstanding the improvements may have added greatly to the value of the land. Freeman, Cotenancy and Partition, section 510. A cotenant can not recover for the value of improvements where they are made by him with full knowledge of the rights of his cotenants. Freeman, Cotenancy and Partition, section 262. We find proof in the record in the nature of an admission showing the value of the rents and profits of block 21, while Maxwell was in possession of it. No allowance was made in the decree in favor of the appellees on this account, and it would appear from the record, the findings and the decree itself, that the court concluded that the one item would properly balance the other, and so made no findings for or against either party on these items. Appellants were not injured thereby, and we hold that the judgment should be sustained, so far as these matters are concerned.

4. Lastly it is contended by the appellants that the court erred in excluding from its decree certain of the taxes sought to be recovered by them. An examination of the whole record and the evidence, including the tax receipts attached to and made a part of the bill of exceptions, shows us that the court gave appellants a lien for all taxes paid on each and every portion of the premises, which they were

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entitled to recover. They certainly could not expect to recover taxes paid by their grantors long before they received their conveyances, or were in possession of the property. The occupying claimant's act does not apply in cases like the one at bar.

We are unable to say that the trial judge was clearly wrong in any part of his findings and judgment herein, and for that reason we recommend that the decree of the district court be affirmed.

OLDHAM and POUND, CC., concur.

AFFIRMED.

ELMER M. ANGLE V. IRAM MANCHESTER.

FILED JULY 1, 1902. No. 11,841.

Commissioner's opinion. Department No. 2.

1. **Judgments, Action on Foreign: PLEADING AND PROOF OF FOREIGN LAW.** Where a suit is instituted on a judgment of another state rendered in a manner unknown to the jurisprudence of this state, the existence of the laws of such other state which render the judgment valid must be both alleged and proved.
2. **Judgments, Action on Foreign: FAILURE IN PROOF OF VALIDITY: RECOVERY ON NOTE.** Where, in an action on a foreign judgment plaintiff's petition contains but a single cause of action, and that on the judgment only, and he fails to introduce sufficient evidence to prove the validity of his judgment, he will not be permitted to recover on the note on which the judgment is alleged to have been rendered.
3. **Principal and Agent: AGENCY TO PAY DEBT OF PRINCIPAL: CONFLICTING EVIDENCE.** An agency to pay the debts of a principal with the resources of the agent is not one greatly to be desired by the agent, nor one which should be imposed on an unwilling victim of such an alleged undertaking on doubtful and conflicting testimony.
4. **Evidence: PRESUMPTION AS TO LAW OF FOREIGN STATE.** In the absence of any proof on the subject this court will presume that the laws of the state of Pennsylvania are the same as the laws of this state.

ERROR from the district court for Valley county. Tried below before LETTON, J. *Reversed with dismissal.*

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H. E. Olson and O. A. Abbott, for plaintiff in error.

Babcock & Babcock, Hall & Johnson and Clement Bros., contra.

OLDHAM, C.

This was an action to recover a balance alleged to have been due on a judgment entered by the prothonotary of the court of common pleas of the state of Pennsylvania on what is known to the laws of that state as a judgment note. The note was dated April 20, 1889, for \$3,000 due in five years and payable to S. A. Wheaton, and was executed and delivered to him for borrowed money by the defendant, Iram Manchester. The day after the note was delivered the payee filed the same with the prothonotary (or clerk) of the court of common pleas of Bradford county, Pennsylvania, who entered judgment on the note apparently in conformity with the laws and rules of practice of the courts of that state. This judgment appears to have been revived on the 23d day of March, 1894, by what is known to the laws of that state as an "amicable *scire facias*." On March 26, 1897, this judgment was assigned to the plaintiff in this cause of action in the court below and who is also the plaintiff in error in this court. On March 29, 1897, an execution appears to have been issued on this judgment and certain lands owned by defendant, Manchester, situated in Bradford county, Pennsylvania, appear to have been sold under the execution, and the proceeds of such sale, amounting to \$1,800, were applied upon the judgment and costs in the Pennsylvania court. Plaintiff's cause of action was instituted to recover the balance claimed to be due on this alleged judgment. In the petition the laws of the state of Pennsylvania authorizing a judgment procured in the manner herein set forth are properly pleaded.

Defendant, in his answer to plaintiff's petition, admitted the execution of the note on which the judgment was claimed to have been rendered, but denied that any valid

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judgment had been rendered on said note by any court having competent jurisdiction either of the subject-matter of the controversy or of the person of the defendant. Defendant then proceeded by way of counter-claim to allege various causes of action against plaintiff in connection with this transaction, the substance of which seemed to be that the defendant had appointed the plaintiff his agent to pay off the judgment, or, according to his theory, the note which S. A. Wheaton held against defendant in Pennsylvania, and that defendant relied upon the plaintiff to faithfully perform his agency, but that instead of doing this plaintiff had the pretended judgment assigned to himself and wrongfully caused an execution to issue against defendant's property in Pennsylvania of the value of \$5,000 and caused the same to be sacrificed at forced sale for the pittance of \$1,800. The other cause of action attempted to be set up in defendant's counter-claim was for the alleged injury to plaintiff's business reputation by false and slanderous reports, said to have been circulated by plaintiff affecting the financial solvency of defendant among his old friends and business associates in the state of Pennsylvania. For all these injuries defendant prayed judgment against the plaintiff in the sum of \$7,100.

Plaintiff replied to the new matter in defendant's answer by a general denial. Trial was had to a jury, and there was a verdict for the defendant for \$2,820.30. The lower court found this verdict to be excessive and directed a *remittitur* of \$1,865.80 of said amount, and the defendant having offered in open court to remit said sum, such *remittitur* was accordingly entered, and judgment was rendered in favor of defendant and against plaintiff for the sum of \$945.55, and plaintiff brings error to this court.

To arrive at a correct solution of the numerous and confused propositions presented for our consideration in this record we must determine, if possible, the proper standing of each of the litigants under the issues presented by his pleadings and the proof offered in support of his allegations. Plaintiff relies on an interstate judg-

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ment procured in a manner unknown to the laws and rules of practice of the courts of the state of Nebraska. In his petition; however, he alleges the laws of the state of Pennsylvania which authorize and validate his judgment, but in the record before us he utterly fails to introduce any proof of any kind tending to show the laws of Pennsylvania on which he must rely to support the validity of his judgment.

In the case of *Snyder v. Critchfield*, 44 Neb., 66, 62 N. W. Rep., 306, this court, in discussing a judgment rendered on the power of attorney contained in a judgment note in the state of Pennsylvania, says: "It must be remembered that judgments on notes of this character are not known to the jurisprudence of our state, and that the note having been made in Pennsylvania and the judgment there rendered, the effect and validity of the contract must be determined by the law of Pennsylvania. What that law is was a fact to be established by evidence in this case." See also, *Freeman*, Judgments [4th ed.], section 571; *Thomas v. Pendleton*, 46 N. W. Rep. [S. Dak.], 180; *Teel v. Yost*, 5 N. Y. Supp., 5.

It might be suggested that even if there is no proof in the record of the laws of Pennsylvania which authorize the judgment sued upon, there is still a good cause of action alleged in the petition on the note on which the judgment is claimed to have been rendered, and that as the execution and delivery of the note is admitted by the defendant, plaintiff has established a good cause of action on the note independent of the judgment. The answer to this is that plaintiff's petition contains but one count and a single cause of action, and that cause of action is the alleged judgment rendered by the Pennsylvania court. While in the description of the judgment the note on which such judgment is claimed to have been based is fully set out in the petition, the petition further sets out the laws of Pennsylvania necessary to make the judgment a valid one, and further discloses the fact that an execution had been issued on this Pennsylvania judgment and some of the defend-

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ant's property had been sold under such execution and the proceeds thereof applied as part payment on the judgment. Under this state of facts it is apparent that the note set out in plaintiff's petition had been merged in the judgment before the beginning of this action and that the action is based on the judgment alone. It would then appear under the allegations and proof offered in this case by plaintiff, that his cause of action should be dismissed. *Krower v. Reynolds*, 99 N. Y., 248, 1 N. E. Rep., 775.

Passing now from this review of the pleadings and proof offered by the plaintiff to the causes of action set forth in the answer and counter-claim of defendant; we ascertain from a careful examination of the lengthy answer filed by defendant that he relies upon two separate and distinct causes of action against the plaintiff. One of these is in the nature of an action for damages to his business reputation by alleged false and slanderous reports as to his financial condition said to have been circulated in the state of Pennsylvania by the plaintiff. Without determining whether or not an action for slander may be properly pleaded as a counter-claim against a suit on a judgment, we may dispose of this cause of action by saying that there is absolutely no proof in the record to support this allegation of injury. The evidence clearly shows that the plaintiff, instead of seeking to injure the financial reputation of the defendant by circulating reports derogatory to his business credit among his old friends and business associates in Pennsylvania, spoke encouragingly of the honesty of the defendant and of his probable ability to meet all his financial obligations.

Proceeding then to an examination of the other cause of action contained in the defendant's answer, we find that it is based on the theory that plaintiff, Angle, had accepted an agency from the defendant in December, 1896, or January, 1897, to return to the state of Pennsylvania and satisfy the claim which one S. A. Wheaton held against the defendant for about \$3,500, and that instead of acting in good faith in the matter for the defendant the plaintiff

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procured an assignment of this claim or judgment to be made to himself by S. A. Wheaton and wrongfully issued an execution on an illegal judgment and caused defendant's real estate to be sacrificed at a forced sale. With reference to the evidence offered on this cause of action there is some conflict, and some things which throw some light on the controversy are admitted and undisputed. In the first place it is admitted that S. A. Wheaton, plaintiff, Angle, and defendant, Manchester, were all old acquaintances and neighbors in the state of Pennsylvania. That plaintiff, Angle, and S. A. Wheaton still reside in Pennsylvania and that defendant has for some time prior to this controversy been a resident of the state of Nebraska, but owned property, which he called his old homestead, in the state of Pennsylvania prior to this controversy. About what the value of this property is there was a sharp conflict in the testimony, and in view of the conclusion which we shall finally reach it is not necessary to comment on this evidence. It also appears that defendant, Manchester, had been borrowing money in the state of Pennsylvania and loaning the same at an advanced rate of interest in this state, and that the note which lies at the bottom of this controversy had been given for money which he had borrowed from S. A. Wheaton. It also appears that plaintiff, Angle, had purchased a note from defendant, Manchester, and that he had also loaned money to defendant's son and that defendant had indorsed the note which his son had given to plaintiff. It appears that in December, 1896, plaintiff, Angle, came out to North Loup, Nebraska, a town near the residence of defendant, to look after some of his business matters, and while there visited the defendant a number of times. Plaintiff claims that he had been requested by S. A. Wheaton to make an effort to collect Wheaton's judgment from the defendant while in Nebraska, and that in furtherance of this request he spoke to defendant about making some arrangements to satisfy the judgment as it had run so long that Wheaton was beginning to feel uneasy about it. Defendant admits that

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plaintiff spoke to him about the Wheaton judgment, but says that plaintiff denied that he was Wheaton's agent in the matter and said that he was only acting for Wheaton as one neighbor would act for another. Defendant says that plaintiff then agreed to act as his agent in paying off and satisfying the judgment, and that he furnished plaintiff with the description of a number of tracts of land in Nebraska which he either owned or controlled and which he agreed to procure deeds for and transfer the same to S. A. Wheaton if Wheaton would accept these in payment of his claim. He also says that he authorized Angle, if necessary, to offer Wheaton \$400 in money in addition to these lands. He says that Angle agreed to do this and also agreed that if Wheaton would not take this offer he, Angle, would pay the judgment himself and would afterwards pay himself from the lands listed by the defendant. Plaintiff, Angle, admits that defendant furnished him with this description of lands and authorized him to offer these lands and \$400 in money, if necessary, to S. A. Wheaton in satisfaction of his judgment, but he denies emphatically that he ever agreed to pay the judgment out of his own means if Wheaton refused the offer, or that he ever agreed to act as the agent of defendant in paying off this judgment. Defendant's theory of this controversy was attempted to be corroborated by the testimony of his wife and son, neither of whom was present when the alleged agreement was made, but both of whom testified that Angle afterwards told them that he had agreed to act as the agent of plaintiff in paying off this judgment. This testimony, however, Angle denies.

It clearly and conclusively appears that when plaintiff, Angle, returned to Pennsylvania he did submit defendant's offer to Wheaton and that Wheaton refused to accept the offer, but did agree to take his claim less \$1,000 if defendant would pay him that amount in cash. There is a dispute about how often Angle communicated with the defendant about the matter before he took an assignment of the claim. Angle claims he wrote twice and got but one reply; defendant denies that he ever got but one

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letter from Angle, and that contained Wheaton's offer to take the claim in cash less \$1,000. This offer defendant refused in a scurrilous and insulting letter to Angle. This letter is in the record but is unfit for publication without fumigation. Defendant made some effort to show a consideration to plaintiff, Angle, for undertaking the onerous burden of paying defendant's debt with plaintiff's own money. This consideration he claimed was for services that he, defendant, had rendered in aiding plaintiff in the collection of a note sold plaintiff by defendant and on which defendant was an indorser with an enlarged liability. This plainly was no consideration at all. The evidence showed that the defendant was to have one interest coupon on the note when collected and that he received this when the loan was settled. The evidence also shows that the defendant has never parted with anything of value in reliance on the peculiar agency which he seeks to have imputed to plaintiff, Angle. An agency to pay the debts of a principal with the resources of the agent is not one greatly to be desired by the agent, nor one which should be imposed on an unwilling victim of such an undertaking on doubtful and conflicting testimony.

Again, if we presume, as we must in absence of proof to the contrary, that the laws of the state of Pennsylvania are the same as the laws of the state of Nebraska, then the alleged sale of defendant's Pennsylvania lands under a proceeding which would be a mere nullity in this state has not divested him of the title to his old homestead in Pennsylvania. As this will dispose of the case we need not examine the instructions complained of.

We therefore recommend that the judgment of the district court be reversed and that plaintiff's petition and defendant's counter-claim each be dismissed.

POUND and BARNES, CC., concur.

The judgment of the district court is reversed and plaintiff's petition and defendant's counter-claim are each dismissed.

REVERSED WITH DISMISSAL.

Johnson v. Nelson.

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ALFRED JOHNSON V. JOHN NELSON.

FILED JULY 1, 1902. No. 11,871.

Commissioner's opinion. Department No. 1.

Conversion: ADMISSIONS AND DENIALS IN ANSWER: TRIAL: RIGHT TO OPEN AND CLOSE. Where in an action for conversion, defendant admits possession of the property, but sets up a right to it derived from plaintiff, and denies generally, the right to open and close at the trial is in plaintiff.

ERROR from the district court for Saunders county. Tried below before SORNBORGER, J. *Reversed.*

John L. Sundean, for plaintiff in error.

Frank W. Barry, *contra.*

HASTINGS, C.

The sole question raised in this case is as to the propriety of the district court's action in giving to defendant the opening and closing at the trial. Of course, under subdivision 3 of section 283 of the Code of Civil Procedure, "the party who would be defeated if no evidence were given on either side, must first produce his evidence," so the simple test is, who would be defeated in the action if no evidence were introduced?

Plaintiff's petition alleges his ownership and right of possession in a red cow nine years old; that defendant was wrongfully detaining her and had converted her to his own use; that before commencing the action plaintiff had demanded her and defendant refused to allow plaintiff to take possession of her; that she was not taken for any tax, fine or amercement, etc., against plaintiff; that at the time of the conversion she was worth \$40, and by reason of the conversion plaintiff was damaged \$55. He asks judgment for that sum and costs.

The answer alleges the giving of note by plaintiff to defendant in the sum of \$40; that to secure the payment of

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the note the cow was delivered by plaintiff to defendant; that she was agreed to be held until the note should be paid in full; that the note has never been paid; that a judgment was obtained upon it, which is still in full force. In addition to this, defendant denied each allegation of the petition not admitted. The reply simply was that the note pleaded in the answer was paid and denies every allegation not admitted.

It is extremely hard to see how any judgment could have been rendered against defendant in this action if no evidence had been produced; he had denied the value of the cow; he had denied the conversion; he had admitted no allegation of the plaintiff's except the possession, and that, in the absence of evidence to the contrary, would be presumed lawful. The denial of the damage alone would be sufficient to require the plaintiff to proceed with his proof to entitle him to a recovery, and would give plaintiff the opening and closing. *Summers v. Simms*, 58 Neb., 579.

As above suggested, the denial of the conversion and of the plaintiff's right of possession under the rule that defendant's possession would be presumed lawful until the contrary is shown, would seem to require, at least, that plaintiff show the holding by defendant to be without his assent.

An unwarranted denial of the right to open and close is deemed by this court prejudicial error. *Brumback v. American Bank of Beatrice*, 53 Neb., 714.

It is recommended that the judgment of the trial court be reversed and the cause remanded for further proceedings.

DAY and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

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THE STATE OF NEBRASKA, EX REL. CHARLES W. YOUNG, v.
EDWARD ROYSE, MAYOR OF THE CITY OF BROKEN BOW,
ET AL.

FILED JULY 1, 1902. No. 11,877.

Commissioner's opinion. Department No. 2.

1. **Limitation of Actions: ENJOINING JUDGMENT: TIME DEDUCTED.**
When the collection of a judgment is enjoined, the time during which the injunction is operative will be deducted from the statutory period of limitations in determining whether or not the judgment is dormant.
2. **Judgments: AGAINST CITY: CHARACTER OF: TAXATION TO PAY.** In determining the power of a city to levy taxes to pay judgments against the city, the judgments partake of the character of, and are governed by the same rules of limitation as, the original claims upon which they are based.
3. **Mandamus: WHEN WILL NOT LIE: TAXATION.** Mandamus will not lie to compel a city council to levy a tax in excess of its legal limitation.

ERROR from the district court for Custer county. Tried below before SULLIVAN, J. *Affirmed.*

O'Neill & Gilbert, for plaintiff in error.

The fact that the statute, which authorized the city to contract the indebtedness upon which the judgments were based, also provided for a special fund to pay the same, and limited the levy therefor, does not relieve the city from paying the same out of other levies which it is authorized to make. *United States v. County of Clark*, 96 U. S., 211; *United States v. County of Macon*, 99 U. S., at page 592, note; *Knox County Court v. United States*, 109 U. S., 229; *United States v. Brown*, 41 Fed. Rep., at page 483; *United States v. Knox County*, 51 Fed. Rep., 880; *Macon County v. Huidekoper*, 134 U. S., at page 336; *Town of Darlington v. Atlantic Trust Co.*, 78 Fed. Rep., 596, affirming *Atlantic Trust Co. v. Town of Darlington*, 63 Fed. Rep., 76; *Ft. Madison Water Co. v. City of Ft. Madison*, 110 Fed. Rep., 901; *The Creston Waterworks Co. v. City of Creston*, 101 Ia., 687.

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The city authorities are not limited to a ten-mill levy prescribed by statute for general purposes when the claims sought to be collected are judgments against the city. Section 69, chapter 14, Compiled Statutes, 1887; *Dawson County v. Clark*, 58 Neb., 756; *Mayor, etc., of the City of Helena v. United States*, 104 Fed. Rep., 113.

C. L. Gutterson and A. R. Humphrey, contra.

The statutes of the state do not authorize an unlimited levy of taxes by municipal boards to pay judgments against the municipality. *Chase County v. Chicago, B. & Q. R. Co.*, 58 Neb., 274. The fact that the claims have been reduced to judgments does not alter the source of their payment. *Jackson v. Washington County*, 34 Neb., 680; *Grand Island & N. W. R. Co. v. Baker*, 71 Am. St. Rep. [Wyo.], 926; *Ralls County Court v. United States*, 105 U. S., 733; *United States v. County of Macon*, 99 U. S., 582; *Commissioners of Brownsville v. Loague*, 129 U. S., 493. The amount of tax the municipality had power to levy was limited both by law and contract to seven mills. *State v. City of Wahoo*, 62 Neb., 40.

OLDHAM, C.

In 1888, the city of Broken Bow, a city of the second class having less than 5,000 inhabitants, by ordinance granted a franchise to the Broken Bow Water-Works Company for the construction and operation of water works for the city. The ordinance provided for a certain number of fire hydrants and for increasing the number, as the mains should be extended, and fixed the rate to be paid for hydrant rentals and provided for the levy of taxes to the amount of seven mills to create a fund for the payment of such hydrant rentals. The sum realized by this levy was insufficient to create a fund large enough to pay the company the stipulated rate per hydrant, and in the years 1892, 1893 and 1894, the water company instituted suits and procured judgments against the city of Broken Bow in the district court for Custer county,

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Nebraska, for the balance due the water company on its contract for hydrant rentals. These judgments were procured for the following amounts: June 14, 1892, \$4,365.40; November 10, 1893, \$1,641.43; July 12, 1894, \$2,225. No appeal or error proceedings were prosecuted for the reversal or modification of any of these judgments.

On the 29th day of October, 1895, Taylor Flick, a taxpayer of said city, and the city of Broken Bow, procured an order perpetually enjoining the collection of each and all of these said judgments in the district court for Custer county, but on an appeal to this court on the 9th day of January, 1899, the judgment of the district court was reversed and plaintiff's petition dismissed. *City of Broken Bow v. Broken Bow Water-Works Co.*, 57 Neb., 548, 77 N. W. Rep., 1078. Charles W. Young, the relator in this cause of action, is the assignee of each of these judgments and on the 29th day of May, 1900, he instituted the suit at bar against the mayor and city council of the city of Broken Bow for a mandamus commanding the respondents and their successors in office to levy and certify to the county clerk of Custer county a tax sufficient to pay these judgments and to apply such tax to their payment when so collected. The respondent city for answer and return to the alternative writ of mandamus alleged in substance that they had levied the full limit of seven mills for water supply each year since their contract with the Broken Bow Water Company, and had applied the proceeds of such levy to the payment of their obligations to said company, and that they had levied the full limit of ten mills for general purposes and had collected and applied the same to the current expenses of the city and that it would require the full limit of ten mills to pay the current expenses of the city for the ensuing year. The answer also alleged that the judgments were dormant and denied the validity of each of the judgments. On issues thus joined the district court found for the respondents and dismissed the relator's petition and relator brings error to this court.

No material facts are in dispute in this case and some

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of the questions of law ably and earnestly discussed by the learned counsel of each of the contending parties need not be determined in reaching a conclusion in this case. One of these questions is as to how far the contending parties are bound by the judgment of this court in the case of *City of Broken Bow v. Broken Bow Water-Works Co.*, *supra*, as to the validity of the several judgments in issue? Whether the opinion in that case amounts to a final adjudication of the validity of these judgments we are not called upon at this time to decide, but we do hold that the injunction granted in that case and continued in force for nearly four years operated as a suspension of the running of the statute of limitation against these judgments while operative. And although the application for mandamus was made more than five years from the dates of these judgments the relator is nevertheless entitled to deduct from this period of limitation the time during which he was enjoined and, because after the allowing of this deduction, less than five years appear to have elapsed from the rendition of the earliest judgment to the beginning of this action, we hold that none of these judgments is dormant.

The next contention of relator is that the fact that the city has levied the full amount of seven mills for water supply does not relieve it from making payment on these judgments out of other levies made in conformity with the provision of section 69, subdivision 2, article 1, chapter 14, Compiled Statutes of 1887, which authorizes a city council "to levy any other tax or special assessment authorized by law." This identical question was before this court in the recent case of *State v. City of Wahoo*, 62 Neb., 40, 86 N. W. Rep., 923, and the learned commissioner who wrote the opinion in discussing this question said: "It remains to mention the contention of the relator that the council was empowered to contract for water-works, and was by subdivision 2, of section 69, of the act of 1879 (organizing municipal corporations), in all its forms, and amendments, authorized to levy 'any other tax or

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special assessment authorized by law,' and, therefore, could and should make a special provision to meet this contract. We are not able to uphold this contention. Both the act of March 10, 1885, and that of March 31, 1887, expressly limit the tax that may be levied to pay on contract for water. This contract purports expressly to be one for the supply of water. That it is in the form of a rental of hydrants makes it none the less what it says it is,—an agreement to supply water. We apprehend that the relator would expect scant attention if its claim was only that it furnished dry hydrants."

Counsel for the relator attempts to evade the effect of the holding of this court in the case just quoted from by distinguishing between the nature of the claims presented to this court in the two cases; the claim in the *Wahoo Waterworks Case* having been presented on a contract for water supply and the claim in the case at bar being founded on judgments rendered on a similar contract. This presents the question: Whether in determining the power of a municipality to levy a tax in payment of a judgment you may look beyond the judgment to examine into the cause of action on which such judgment was rendered? Ordinarily a cause of action when reduced to a judgment is merged in the judgment, and the judgment constitutes a new cause of action from the date of its rendition, but where justice requires it a judgment will not be construed as a new debt but rather as a continuation of the old one. Freeman, *Judgments* [4th ed.], section 244. This doctrine is peculiarly applicable to judgments against municipal corporations in which the collection of the judgment must be enforced, as in the case at bar, by extraordinary process and in which there is generally a statutory or constitutional limit on the power of the municipality to levy taxes for particular purposes. A judgment against a city or county is but an audited demand against such municipality which is no longer open to contest. Execution can not issue upon such a judgment for its collection, and mandamus against the

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taxing power of the municipality is the only remedy when payment is denied. Freeman, Judgments [4th ed.], 432. Because of this peculiar character of judgments against municipalities it has been held by eminent authorities that the right exists to look beyond the judgment to the cause of action on which such judgment is founded in determining whether the authority exists to levy a tax in satisfaction of such judgment. The leading case in support of this doctrine is that of *United States v. County of Macon*, 99 U. S., 582, 25 L. Ed., 331. This was a case in which mandamus was sought to compel the county board of Macon county, Missouri, to levy a tax for the payment of a judgment rendered against said county in the United States court on improvement bonds issued by the said county to a railroad company. The board set up in its answer and return to the alternative writ that it had levied the full limit of taxes permitted for the claim on which the judgment was founded. The writ was denied. Waite, Ch. J., in rendering the opinion of the court, after an examination of the limit on the taxing power of the county board, prescribed by the constitution and laws of the state of Missouri, said: "While the debt was authorized, the power of taxation for its payment was limited, by the act itself and the general statutes in force at the time, to the special tax designated in the act, and such other taxes applicable to the subject as then were or might thereafter by general or special acts be permitted. No contract has been impaired by taking away a power which was in force when the bonds were issued. The general power of taxation to pay county debts is as ample now as it was when the railroad company was incorporated and the debt incurred. The difficulty lies in the want of original power. While there has undoubtedly been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not unfrequently been gross carelessness on the part of purchasers when investing in such securities. Every purchaser of a municipal bond is

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chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound. So, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation to pay the bond, the holder can not require the municipal authorities to levy a tax for that purpose. If the purchaser in this case had examined the statutes under which the county was acting, he would have seen what might prove to be difficulties in the way of payment. As it is, he holds the obligation of a debtor who is unable to provide the means of payment. We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We can not create new rights or confer new powers. All we can do is to bring existing powers into operation. In this case it appears that the special tax of one-twentieth of one per cent. has been regularly levied, collected, and applied, and no complaint is made as to the levy of the one-half of one per cent. for general purposes. What is wanted is the levy beyond these amounts, and that, we think, under existing laws, we have no power to order"; and continuing he says: "We have not been referred to any statute which gives a judgment creditor any right to a levy of taxes which he did not have before the judgment. The judgment has the effect of a judicial determination of the validity of his demand and of the amount that is due, but it gives him no new rights in respect to the means of payment." This view is further sustained by the following authorities: *Cooley, Taxation* [2d ed.], 738; *Commissioners of the Taxing District of Brownsville v. Loague*, 129 U. S., 493; *Grand Island & N. W. R. Co. v. Baker*, 6 Wyo., 369, 71 Am. St. Rep., 926; *Board of Commissioners of Osborne County v. Blake*, 25 Kan., 356.

The conclusion which we are about to reach in this controversy is not in conflict with any principle announced by this court in the case of *Dawson County v. Clark*, 58 Neb., 756, 79 N. W. Rep., 822. In this case

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the court held that a levy might be made by a city council in excess of the maximum amount authorized to be levied by statute, for general corporate purposes; for the payment of judgments of a general nature against the corporation, and that the power to make such levy was conferred by section 69, chapter 14, *supra*, but no question was raised as to the character of the claim for which the judgment was rendered, and the claim appears to have been one which was payable from the general revenue fund of the city.

State v. City of Wahoo, supra, settles the question that section 69, chapter 14, *supra* (subdivision 2 of section 69 of the act of 1879), does not apply to claims for furnishing water to a municipality; and if we are correct in our conclusion that we may look beyond these judgments to the claims on which they are founded, it then follows that the judgment of the district court denying this writ was right, and we recommend that it be affirmed.

POUND and BARNES, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

THE STATE OF NEBRASKA, EX REL. CHARLES W. YOUNG, v.
EDWARD ROYSE, MAYOR OF THE CITY OF BROKEN BOW,
ET AL.

FILED NOVEMBER 18, 1903. No. 11,877.

Commissioner's opinion. Department No. 2.

Mandamus: WHEN WILL NOT LIE: TAXATION: WATER SUPPLY. City authorities will not be required by mandamus to levy tax for water supply in excess of limit on such tax existing at time of contract. *State v. City of Wahoo*, 62 Neb., 40, followed and approved.

REHEARING of case reported *ante*, page 262.

ERROR from the district court for Custer county. Tried below before SULLIVAN, J. *Judgment below affirmed.*

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O'Neill & Gilbert, for plaintiff in error on rehearing.

The first remark of the court as to the case of *State v. City of Wahoo*, 62 Neb., 40, is premised by the statement that the "contention of relator is that the fact that the city has levied the full amount of seven mills for water supply does not relieve it from making payment on these judgments out of other levies made in conformity with the provisions of subdivision 2 of section 69, article 1, chapter 14, Compiled Statutes of 1887, which authorizes a city council 'to levy any other tax or special assessment authorized by law.'" Then this language follows: "This identical question was before this court in the recent case of *State v. City of Wahoo*," and so much of the opinion is quoted as sets forth the denial of relator's contention that the city "could and should make a special provision to meet" the claims for water rent. The only other reference to this case is found in the closing paragraph of the opinion, to the effect that it "settles the question" that the provision giving the city authority to levy any other tax or special assessment authorized by law "does not apply to claims for furnishing water to a municipality." Then, says the opinion, "if we are correct in our conclusion that we may look beyond these judgments to the claims on which they are founded, it then follows that the judgment of the district court denying this writ was right." If, however, the judgments could be paid out of the general fund to the extent of the deficiency in the special fund, then upon the authority of the case of *Dawson County v. Clark*, 58 Neb., 756, the court tacitly admits, we would be entitled to the writ. Thus it is clear that this court, upon the authority of the *Wahoo Case*, has assumed that the payment of the claims underlying the judgments can only be made from the special seven-mill levy and can not be made from the general fund, as we have above stated to be the fact,—an assumption, however, which we shall show to have been unwarranted.

In the *Wahoo Case* no judgments had been rendered and

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a mandamus was asked to compel the levy of a special tax to pay hydrant rentals in excess of the seven-mill levy provided for the "water fund." The relator contended, among other things, that under subdivision 2 of section 69 of the act of 1879 (organizing municipal corporations), in all its forms and amendments, the city was authorized "to levy any other tax or special assessment authorized by law," and that it therefore could and should make a special provision to meet this contract. The most that can be claimed from this decision is that there is no special assessment "authorized by law" to be levied for the payment of an unliquidated claim against the city for hydrant rentals, beyond the seven-mill levy provided by statute. In other words, under the provision of the statute a specific levy for the payment of the hydrant rentals is limited to seven mills, and a specific levy beyond this amount will not be enforced. This is the full scope of the decision, and, within its scope, it is probably not out of harmony with the decision of the supreme court of the United States in *United States v. County of Macon*, 99 U. S., 582, which we will call the *Huidekoper Case*, cited and followed as an authority in the opinion above, and quite an extensive line of authorities of that court involving the identical questions raised in the *Huidekoper Case*, beginning with *United States v. County of Clark*, 96 U. S., 211, and running down through the *Huidekoper Case* to the latest expressions of that august body. But neither the *Huidekoper Case*, nor any of the other cases included in that line of authorities, are authority for the decision ultimately announced by this court, as a close analysis of those cases makes manifest. And unless these cases are to be accepted in part and rejected in part, this court must retract much, if not all, that is said in the opinion herein.

The opinion in the *Wahoo Case* does not hold that the water company was not entitled to collect from the city a remuneration for water furnished in excess of the seven-mill levy. If it did, it would stand alone for that proposition and opposed to all other authorities. It only holds

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that the provision of subdivision 2 of section 69 of the act of 1879, giving power "to levy any other tax or special assessment authorized by law," does not give the power to levy a special additional tax to pay for water supply when the claim for payment for such water is unliquidated and not in the form of a judgment. And, as we understand the opinion, the court takes its position for the reason, in part, that the legislature has expressly limited the tax which may be specially levied to pay for water to seven mills on the dollar, and that the general power to contract for water is, by this special provision, cut off from carrying with it a power to levy taxes in an indefinite amount to meet the obligations of the contract, which, but for the limitation, would be attached to this broad power to contract. Had this limitation not been placed in the act, we believe we can say, without fear of contradiction, that this court would have held that the city had the power and was in duty bound to levy the tax, even without regard to the provisions of said subdivision 2. But, had the fact been that the ten-mill levy for general purposes had not been levied, and had the record so shown, we believe this court would have held the water company entitled to have the entire ten mills levied in order that it might collect its deficiency out of that fund. Such is the universal holding of all other courts, and such is particularly held in the *Huidekoper Case* upon which the ultimate decision in the case at bar is based. And our statute is stronger in favor of relator's contention than is the Missouri statute, upon which the *Huidekoper* decision is grounded.

Our statute does not limit the payment for water to the revenue obtained from the seven-mill levy, but merely provides that this special levy shall be made and the collections therefrom retained in a fund known as "water fund,"—in other words, that this special levy shall stand as a special security. But it further expressly provides—subdivision 15 of section 69, article 1, chapter 14—that this levy shall be "in addition to the sum authorized to be levied under subdivision one" (ten mills for general pur-

poses),—in other words, that the water company may look to this general fund for the payments due for hydrant rentals as well as to the special fund.

It would seem that Mr. Huidekoper was in doubt as to his rights and therefore brought one action to secure a special levy to pay his entire judgment and another to secure a warrant upon the treasurer of the county for the payment of this judgment out of the general fund. The court held he was not entitled to the special levy, but that he was entitled to a warrant upon the general funds of the county for the payment of his entire judgment. And why this distinction? For a distinction without an ultimate difference it must needs be considered. Because

“We have not been referred to any statute which gives a judgment creditor any right to a levy of taxes which he did not have before the judgment. The judgment has the effect of a judicial determination of the validity of his demand and of the amount that is due, but it gives him no new rights in respect to the means of payment.”

Here is the distinction: The judgment gave no new right in respect to the means of payment. And there was no statute to give that new right. But in our state article 6 of chapter 77 does give a new right with respect to the means of payment.

The whole burden of the opinion in the first *Huidekoper Case* is that there is no statute giving the county a right to levy a tax beyond one-half of 1 per cent. and one-twentieth of 1 per cent. The right to payment in full is at all times admitted, even to payment from the general fund to cover the deficit in the special one. Now the fact is that we do have a “statute which gives a judgment creditor” a “right to a levy of taxes which he did not have before the judgment,” and we may fairly presume it was enacted to cover just such cases as this and prevent financial embarrassment of a municipality through the depletion of its general fund.

We presume this court will follow the *Huidekoper Cases*, both because they state the law as laid down by all other

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courts and because it is on record in this case as regarding the first as the leading case upon this proposition. Let their doctrine then be granted. This relator is entitled to a warrant upon the general funds of the city of Broken Bow for the payment of the judgments herein involved, and this court, upon mandamus proceedings, would order the warrant drawn. Upon being possessed of that warrant he could apply to the treasurer for its payment and sufficient funds not being on hand therefor, as the record herein shows, the treasurer must register the warrant and by the mandate of section 1 of chapter 93 of the Compiled Statutes of Nebraska, enacted in 1871, prior to the establishment of the Broken Bow waterworks, the treasurer must pay this warrant prior to any subsequently presented. The result is apparent—a bankrupt treasury and nothing with which to pay the running expenses of the city perhaps for years to come.

Article 6 of chapter 77 of the Compiled Statutes permits of the obviation of just this difficulty, by providing that whenever “any judgment shall be obtained in any court of competent jurisdiction * * * for the payment of a sum of money against * * * any municipal corporation, * * * it shall be the duty of the * * * city council * * * to make provisions for the prompt payment of the same” and that upon application therefor mandamus shall issue to compel a levy of a sufficient tax to pay such judgment. Just this statute is what was missing in the *Huidekoper Case* and for want thereof the court felt its inability to order the tax levied.

The levy of taxes by a municipality is a power which it can exercise only by virtue of its delegation by the legislature. Just so far as the legislative act permits it to go it can go, and no farther. If it has not been empowered by the legislature to levy for the payment of hydrant rentals a tax in excess of the ten-mill and seven-mill levies, then it can go no further. Just this was the condition in the *Huidekoper Case*, as expressed clearly in the opinion, and, there being no statute granting the power to levy for

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the payment of judgments in addition to the one-half of 1 per cent. for general purposes and one-twentieth of 1 per cent. for the payment of the bonds and interest thereon, the court could not compel that which the county had no power to do. The clearly expressed doctrine of the *Huidekoper Case* would have compelled that court, had a case involving the facts of *Dawson County v. Clark*, 58 Neb., 756, come before it, to declare its inability to enforce a levy for the payment of all the judgments. And this very doctrine was recognized by this court in the *Dawson County Case* when it discriminated between the judgments against the city of Lexington and those against school district No. 1. The levy for the payment of the judgments rendered against the city was sustained on the theory that the power to levy a tax to pay any and all judgments as granted by article 6 of chapter 77, was not limited in amount by subdivision 1 of section 69, article 1, chapter 14, but was expressly recognized by subdivision 2 thereof ("to levy any other tax * * * authorized by law"), while that for the payment of the judgments against the school district was annulled on the theory that whereas article 6 of chapter 77 gave, in terms, the power to make the levy, section 11, subdivision 2 of chapter 79 (which must be considered as part of the same act and construed in harmony with it) limited the amount of that levy to twenty-five mills, which had already been levied. The judgment against the school district was as valid and binding as that against the city of Lexington and the equity of the former was equal to that of the latter. But the court was bound by the statute to grant justice to the one party and deny it to the other. It is thus clearly apparent that the supreme court of the United States in the *Huidekoper Case* took the exact position which this court did in the *Dawson County Case* with respect to the judgments against the school district, and for the very same reason,—the limitation by legislative act upon the power to make the levy; and it is further clearly apparent that had there been in Missouri a statute similar to article 6 of chapter 77 and subdivision 2 of sec-

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tion 69, article 1 of chapter 14, the mandamus prayed in the *Huidekoper Case* would have been granted.

Under the statute governing cities of the class of Broken Bow a levy of over ten mills is impossible to meet claims properly payable out of the general fund. If at any time there be claims beyond that, prospective or allowed, some of those claims must wait. This is not because of any justice in the matter, but because the taxing powers are absolutely limited by legislative decree. But parties having the claims may put them in judgment and though they exceed a hundred-fold in amount the ten-mill levy, the city is then empowered to levy a tax for their payment. This is the decision in the *Dawson County Case* and is undoubtedly correct. You may not have a tax levied to pay a claim properly payable out of the general fund, but as soon as that claim is in judgment you may have the levy made, and neither this court nor any other court of which we are aware, when such question has been raised, has been embarrassed by any apparent inconsistency, or felt called upon to go back of the judgments, ascertain the nature of the original claims and hold that "the judgments partake of the character of, and are governed by the same rules of limitation as the original claims upon which they are based," until the decision in the case at bar. This apparent inconsistency is not real,—or at least is not based in the allowance of a greater right upon the acquirement of judgment. If there is any inconsistency, it is in not allowing the levy for the whole amount due even before the claim reaches judgment. This is not fair and hardly squares with our ideas of honesty. It is excused, if at all, on the ground that the person dealing with the municipality is bound to know the law and having been advised, inferentially or in fact, that the municipality has but a certain fund from which to pay, takes his chances on both the good judgment and honesty of those in control of the affairs of the municipality. But the legislature has said by article 6 of chapter 77 that there is a limit to the risk thus taken by those dealing with a municipality; that it,

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like an individual, must ultimately do the right thing; that if it be intentionally dishonest by incurring obligations beyond its present capacity to pay, or if it be constructively dishonest, through lack of proper business methods or open prodigality, it shall ultimately pay, and those dealing with it shall not ultimately suffer; and by said article has further said that the citizens of the municipality shall not suffer from these dishonest, loose or improvident acts by having its treasury depleted in the settlement of old scores out of the ten-mill levy and left with nothing with which to pay the absolutely necessary current expenses of its government. And, as we have said above, as warrants must be paid in the order of their presentment, just this depletion of the treasury and wreck of the municipality would oftentimes ensue were it not for this salutary provision of the statute. But the principle and, through all the cases except the one at bar, the fact remain, that it is not the supposed view of the legislators, but the statute itself, which must determine the power and the duty of the municipal officers.

Now the statute does not say that a tax shall be levied to pay some judgments and not others, but that it shall be levied to pay "any judgment" "whenever" it "shall be obtained in any court of competent jurisdiction." This relator has a judgment. It was obtained in a court of competent jurisdiction. What right has this court to say: "Yes, but it shouldn't have been rendered"; or "Yes, but you couldn't have collected it while it was only a claim, and you shall not collect it now just because it is in the form of a judgment."

Three statutes must be considered in the study of this question:

I. Subdivision 1, section 69, article 1, chapter 14, Compiled Statutes of 1887, which gave the right to the city of Broken Bow to levy taxes to the amount of ten mills on the dollar valuation for general revenue purposes and any other tax or special assessment authorized by law.

II. Subdivision 15 of the same section, article and chap-

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ter, which gave the city a right to levy a special tax to pay for water furnished such city not to exceed seven mills on the dollar in any one year.

III. Section 2, article 6, chapter 77 of the Compiled Statutes, which made it the duty of the city to make provisions for the prompt payment of any judgment against it by levying a sufficient tax to pay such judgment, providing the amount raised for ordinary purposes was insufficient to pay the judgment and also cover the general expenses.

These provisions provide for the payment of a claim in any one of three forms which such claim may take. In the first place, the claim of the waterworks company was to be paid from the ten mills levied for general revenue purposes provided the amount levied was sufficient for all purposes. If it was insufficient, then, if there was a law authorizing the levying of a tax or special assessment for the payment of this claim, the city might levy and collect such tax. The second provision of the statute quoted above was such a law. So the city of Broken Bow had power to levy a tax of seven mills to be used exclusively in the payment of the claim of the Broken Bow Waterworks Company. This tax proved to be insufficient, but the city was powerless to increase it unless there was another law authorizing another tax or special assessment. The third statute quoted above furnished the necessary authority providing the claim was put in judgment, for that statute authorized a tax for the payment of any judgment against the city. Thus the provisions are complete for the payment of entire claims held against the city and at the same time they provide safeguards against fraudulent claims being allowed and paid. The legislature thought ten mills would be sufficient to provide for the general expenses of the city. Then it thought it would be a fair arrangement to provide a special seven-mill tax for water supply, and in case this would not be sufficient it was willing to pay for all the water necessary, but it wisely provided that before more than seven mills should be levied the courts should

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pass upon the validity of the claims. It seems to us that these three statutes taken together in their order of progression make the question involved herein clear of solution.

After a claim has been reduced to judgment, it seems absurd to go behind that judgment and look to the claim upon which it is based and apply the statute regulating the tax to be levied to pay that claim, when there is also a statute giving the right to have another and a greater tax levied to pay the judgment itself.

The opinion of the learned commissioner in this case asserts that the conclusion reached denying relator's right to mandamus is not in conflict with the principles announced in the *Dawson County Case*, because the claims forming the basis of the judgments therein involved were themselves payable from the general revenue fund of the city. This is clearly erroneous. The claims upon which the judgments in the *Dawson County Case* were founded were payable only out of the ten-mill levy for general purposes. Their source of payment, then, was as much a limited one as it is claimed is that of the claims underlying the judgments at issue herein, and, if the decision herein is correct, the judgments rendered upon the claims involved in the *Dawson County Case* were payable only out of that ten-mill levy. But the *Dawson County Case* permitted the ten-mill levy to be exceeded for their payment, —because of the provision of article 6, chapter 77. There is no difference in principal between the two cases. If you may look behind these judgments, you should have looked behind the *Dawson County* judgments. If you limit the payment of these to a seven-mill tax, you should have limited those to a ten-mill tax. If the decision in the *Dawson County Case* is right, the decision in this case is wrong.

But, under the statement in the opinion, we have the right to assume, that had the judgments in the case at bar been regarded as payable out of the general revenue fund of the city, the learned commissioner and this court would

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have held that this relator is entitled to the mandamus prayed. That he is entitled to payment from the general fund is held and made absolutely clear in the following authorities: *United States v. County of Clark*, 96 U. S., 211; *Knox County v. United States*, 109 U. S., 229; *United States v. Knox County*, 51 Fed. Rep., 880; *Macon County v. Huidckoper*, 134 U. S., at page 336; *Town of Darlington v. Atlantic Trust Co.*, 78 Fed. Rep., 596; *Atlantic Trust Co. v. Town of Darlington*, 63 Fed. Rep., 76; *Ft. Madison Water Co. v. City of Ft. Madison*, 110 Fed. Rep., 901; *Creston Waterworks Co. v. City of Creston*, 101 Ia., 694.

C. L. Gutterson, A. R. Humphrey and H. M. Sinclair, contra.

The proposition contended for by our opponents is that the debt is merged in the judgment and no inquiry can now be made as to the grounds upon which the debt was founded. This is for the obvious purpose of avoiding the limitation provided by statute.

This statute, is subdivision 15 of section 69 of chapter 14, Compiled Statutes of 1887, chapter 12, Laws of 1887, which provides that the city may levy a tax "to pay for water furnished such city or village under contract, to an amount not exceeding seven mills on the dollar in any one year."

In *State v. City of Wahoo*, 62 Neb., 40, this court held that rental of hydrants is "an agreement to supply water" within the meaning of the statute.

That case also settled another important question, and that is that this act expressly limits the tax that may be levied to pay on a contract for water.

The statute in force at the time of making the contract is the law that governs. *State v. City of Kearney*, 49 Neb., 325.

On the doctrine of merger Mr. Freeman, in his work on Judgments [4th ed.], section 215, says:

"The entry of a judgment or decree establishes in the most conclusive manner and reduces to the most authentic

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form that which had hitherto been unsettled, and which had, in all probability, depended for its settlement upon destructible and uncertain evidence. The cause of action thus established, and permanently attested is said to merge into the judgment establishing it, upon the same principle that a simple contract merges into a specialty. Courts, in order to give a proper and just effect to a judgment, sometimes look behind, to see upon what it was founded, just as they would, in construing a statute, seek to ascertain the occasion and purpose of its enactment."

Again, in section 244, he says:

"The law of merger as applied to judgments does not forbid all inquiry into the nature of the cause of action. * * * And whenever justice requires it, judgments will generally be construed, not as a new debt, but as an old debt in a new form."

In *Donald v. Kell*, 111 Ind., 1, 11 N. E. Rep., 782, the court, after citing numerous cases in support of this doctrine, said: "These cases do not create a new principle; they merely apply an old one, for it has long been the law that, wherever justice requires it, a judgment will be adjudged to be an old debt in a new form, and will not be regarded as creating a new debt." *Owens v. Bowie*, 2 Md., 457; *Wyman v. Mitchell*, 1 Cow. [N. Y.], 316; *Clark v. Rowling*, 3 N. Y., 216; *Madison Township v. Dunkle*, 16 N. E. Rep. [Ind.], 593; *Carit v. Williams*, 74 Cal., 183, 15 Pac. Rep., 751; *Imlay v. Carpenter*, 14 Cal., at page 177; *Murphy v. Manning*, 134 Mass., 488; *Howland v. Carson*, 28 Ohio St., 625; *Horner v. Spelman*, 78 Ill., 206; *Simpson v. Simpson*, 80 N. Car., 332; *Wade v. Clark*, 52 Ia., 158.

Here are contractual rights that are threatened. NORVAL, J., in speaking for the court in *State v. City of Kearney*, *supra*, said: "The legislature could no more diminish the rate of taxation to pay for water supply, as to existing contracts, than it could increase the rate for that purpose. In either case such legislation would impair contractual rights, which is inhibited by the constitution." This constitutional provision is as binding on the courts as it is on

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the legislative department of government. The people of this city contracted with this water company to give it seven mills on the dollar of all property listed for taxation in each year for water furnished the city, and no more. These are the terms to which it agreed. Why should it not be bound? If in its greed it has attempted to overreach this contract, why should it not be repulsed by the "strong arm of the law"? There would be no object attained in looking behind the judgment and adjudging it to be the old debt if the law which governs the old debt is not applied to it. That the court may do this is the reason that it looks behind the judgment. If this judgment is the old debt, it is necessarily the same debt that existed before judgment. Then the sole question here is, what was the law that governed this debt before the judgments? In the solution of this question the *Dawson County Case* sheds no light. It, therefore, has no place in this inquiry.

In the Iowa case, *Ft. Madison Water Co. v. City of Ft. Madison*, 110 Fed. Rep., 901, the court construed the Iowa statute and said: "In my judgment, section 643 creates a fund to be applied on the contract price, and not in extinguishment of the contract price." This section is set out in the relator's brief on page 32.

In *United States v. County of Clark*, the court said: "There is no provision in the act that the proceeds of the special tax alone shall be applied to the payment of the bonds. None is expressed, and none, we think, can be fairly implied."

These excerpts clearly indicate the grounds of the decision in each case. That is, the special tax was not a limitation in either statute. In other words, these courts in construing these respective statutes concluded that the special tax was not intended by the legislature to be the only fund out of which payment should be made. As said by Judge Strong in the *Clark County Case*: "It is no uncommon thing in legislation to provide a particular fund as additional security for the payment of a debt." In short, these courts were construing statutes foreign from

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the one involved in this lawsuit, and not laying down principles of law "to guide our footsteps." But however this may be, this court has construed the statute under consideration, and has held it to be one of limitation. *State v. City of Kearney*, 49 Neb., 325; *State v. City of Wahoo*, 62 Neb., 40.

OLDHAM, C.

The former opinion in this case is reported *ante*, page 262, and in 91 N. W. Rep., 559. The case is fully stated in the original opinion, and a rehearing was granted that we might further examine the conclusion reached at the first hearing, that in determining the want of original power to enter into a contract by the officers of a municipality a judgment rendered on the contract should be treated as an audited claim partaking of the nature of the contract on which it was rendered and not as a new cause of action.

We are urged to re-examine this conclusion on the hypothesis that subdivision 15, section 69, chapter 14, Compiled Statutes of 1887, is an additional grant of power to the city council to levy taxes for water supply and hydrant rentals and not a limitation on such power. This contention, however, flies in the teeth of the construction of this section of the statute by this court in *State v. City of Kearney*, 49 Neb., 325, and *State v. City of Wahoo*, 62 Neb., 40. In each of these cases it was held that the provisions of section 69, *supra*, are a limitation on the power of a city council which enters into each contract for water supply.

We are asked to re-examine and depart from the doctrine of *United States v. County of Macon*, 99 U. S. at page 591, 25 L. Ed., 331, relied upon to support the conclusion reached at the former hearing, because the facts of this case take it without the reason of the rule there established and bring it within the rule laid down in *United States v. County of Clark*, 96 U. S., 211, and also in *Ft. Madison Water Co. v. City of Ft. Madison*, 110 Fed. Rep., 901. Neither of these cases denies the right to look beyond a judgment

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against a municipality to the cause of action on which it is based for the purpose of determining the want of original authority to enter into the contract. The special taxes provided for by the statutes construed in each of these cases were held to be an additional grant of power to provide "a particular fund as additional security for the payment of a debt" and not as limitations on the power to enter into the various contracts. Whereas in the case of *United States v. County of Macon, supra*, the Missouri statute was held to be a limitation on the power of the county authorities to enter into the contract, or as was said by the learned chief justice in this case, the difficulty lay "in the want of original power." "We have," he says, "no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We can not create new rights or confer new powers. All we can do is to bring existing powers into operation."

We therefore conclude, as the officers of the city had no original power to enter into a contract for the levy of more than seven mills for water supply, that the former judgment is sound in reason and fully supported by the cases cited therein, and should be adhered to.

BARNES and POUND, CC., concur.

JUDGMENT BELOW REAFFIRMED.

NOTE.—On February 4, 1904, a second motion for a rehearing, in the above cause, was overruled and rehearing denied in an opinion written by HOLCOMB, C. J. This opinion is reported in 98 N. W. Rep., 459.
—REPORTER.

Ellsworth v. Newby.

ORVILLE G. ELLSWORTH ET AL. V. MARY F. NEWBY ET AL.

FILED JULY 1, 1902. No. 11,905.

91 NW 517
Commissioner's opinion. Department No. 2.

1. **Trial:** INSTRUCTION ON ISSUE NOT RAISED IN PETITION: EVIDENCE ON SAME ISSUE ADMITTED WITHOUT OBJECTION. Although evidence thereon may have been admitted without objection, if the defendant objects and excepts to an instruction submitting an issue not raised by the petition, and no attempt is made to amend to conform to the proofs, the giving of such instruction is error.
2. **Appeal and Error:** INSTRUCTIONS: SUBMITTING QUESTION THAT COULD ONLY BE ANSWERED IN ONE WAY. It is error to submit to the jury a question upon which there could be but one finding under the evidence.

ERROR from the district court for Saline county. Tried below before STUBBS, J. *Reversed.*

J. D. Pope, for plaintiffs in error.

William L. Newby, *contra.*

POUND, C.

This action was brought against Ellsworth to recover the statutory penalty for charging and receiving illegal and excessive fees as justice of the peace. The petition alleges overcharges in four items, namely, \$2 for two days' attendance after the first day, \$5.50 for issuing eleven subpoenas, \$1.70 for filing seventeen papers, and \$7.30 fees of witnesses. In an instruction given by the court at the request of plaintiffs, the jury were directed to find for the plaintiffs if more than two continuances were charged against them and by them paid for. The petition contains no allegation of any overcharge on continuances. Some testimony was introduced on this point without objection. But as defendant objected and excepted to the instruction and no attempt was made to amend so as to conform to the proofs, the instruction was clearly erroneous. A transcript of the defendant's docket and the testimony of the defendant himself make up substantially

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all the evidence. We need not go over it in detail. The chief point of contest seems to have been with reference to the charges for issuing subpoenas and for filings. The transcript shows merely that the justice issued "subpoenas" for a considerable number of witnesses. In consequence parol evidence was admissible to show how many were issued, and defendant testified that he issued the number charged for on his docket, issuing separate writs for the reason that they were applied for at different times. There is nothing to contradict this testimony. It was contended, however, that many of these subpoenas were not served, by direction of the parties, so that the justice had no right to file them and charge for such filing. Upon this point the court charged, at the request of plaintiffs, that it was not proper for a justice to "write up subpoenas and not issue them and proceed without request of either party to file them and make charge for so doing," and that if the defendant had done so there should be a verdict for the plaintiffs. This instruction is sound in point of law, but has no basis in the evidence. The plaintiffs introduced the transcript which showed that the subpoenas were issued. The defendant testified expressly that he issued them and delivered them to a constable and that he filed them at the request of Mr. Newby. It is true he said also that it was his custom to file all papers in causes pending before him. But his positive and direct statement that Mr. Newby asked him to file these subpoenas is not controverted in any way. There could have been but one finding upon the question submitted by the instruction quoted from and to submit it to the jury as anything calling for their decision was clearly erroneous. As this item of charge for filing papers was one of the principal issues on the trial we cannot say that the error was without prejudice. The verdict may rest on this very point.

We recommend that the judgment be reversed and the cause remanded.

BARNES and OLDHAM, CC., concur.

REVERSED AND REMANDED.

Burnham v. Meredith.

SUMNER W. BURNHAM V. JEREMIAH C. MEREDITH.

FILED JULY 1, 1902. No. 11,987.

Commissioner's opinion. Department No. 3.

Damages, Measure of: DISEASE AMONG SHEEP: INSTRUCTIONS. Instruction relating to the measure of damages examined and approved.

ERROR from the district court for Lancaster county. Tried below before FROST, J. *Affirmed.*

Sawyer & Snell, for plaintiff in error.

George A. Adams, contra.

DUFFIE, C.

The defendant in error brought his action against the plaintiff in error in the district court for Lancaster county, stating in his petition that on the 13th of October, 1897, he purchased from the defendant about 1,000 head of sheep; that at the time of making such purchase he had no experience in handling sheep and so notified the defendant, and also notified him that he had learned that in this country there was a disease among sheep known as the "scab"; that he knew nothing about said disease or how to treat it or the effect that it had upon sheep, and that he would not purchase said sheep unless the defendant would protect him against said disease among said sheep; that defendant thereupon agreed with plaintiff that in the event that said disease known as scab should break out among said sheep that he, the defendant, would at once, upon notice of that fact, treat them and cure them of said disease and would immediately send a man who was skilled in treating the disease to treat and care for them so that said disease would in no way damage or injure said sheep; and that he bought the sheep relying upon said representations and agreement. His petition further alleges that shortly after his purchase of the sheep

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they became affected with the scab and that he, being ignorant of its treatment, at once notified the defendant and asked him to treat them; that the defendant neglected to treat them or to send him a skilled man in that business as he had promised and agreed, and that being unable to treat them himself, and being unable, after diligent effort, to secure anyone else to treat them, they were damaged by said disease to the extent of \$1,500, for which amount he asked judgment. The jury returned a verdict for \$500, upon which judgment was entered and the defendant below has brought the case by error to this court.

We are hardly able to determine from the petition whether the plaintiff intended to declare upon a warranty against damage suffered by the sheep on account of the scab, or for breach of contract on account of the defendant's neglect to treat the sheep or to procure some one skilled in the treatment of that disease to do so. In view of the eleventh instruction of the court we incline to the belief that the case was tried upon the theory that both issues were presented and were to be passed upon by the jury. The petition was not attacked for being uncertain or indefinite, nor does it appear that any objection was made thereto on account of two causes of action being stated in a single count, and we will therefore have to determine the case on the theory upon which it was tried in the district court. The argument of plaintiff in error is based principally on his first assignment of error which relates to the measure of damages. In its eleventh instruction the court instructed the jury upon this question as follows: "In the event that under the evidence and the instructions you find for the plaintiff, then you will assess as the amount of his recovery the difference between the value of the sheep at the time they were dipped by the plaintiff and what that value would have been had the defendant promptly dipped them after being notified that they had the scab if you find that he was so notified, unless you should find that the defendant agreed to hold the plaintiff harmless by reason of the disease known as the "scab,"

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in which event the measure of plaintiff's recovery would be the difference between the value of the sheep and what that value would have been had they not become afflicted with said disease. On the other hand, should you find for the defendant you will so say by your verdict."

It seems to be conceded by both parties that the treatment known as "dipping" will arrest the disease of scab and prevent further damage from the disease. The plaintiff in error insists that the true measure of damages in this case is such a sum as it would reasonably cost to procure treatment of the sheep. We can not agree with this contention. There are two reasons to urge against it. First: if the plaintiff in error when notified that the sheep were affected with the scab did not refuse to treat them or to procure some one to do so, the defendant in error had a right to wait a reasonable time to give him an opportunity to perform his agreement before himself taking steps to have them treated. And, second, it is alleged, and the proof is sufficient to support the finding, that the defendant in error did not himself know how to treat the scab and after reasonable inquiry and effort, could not procure others to perform that service. In this state of the case we think that the instruction announced the proper rule of damage. We discover no error in the record and therefore recommend that the judgment of the district court be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

VALERIA JANOSKA, APPELLEE, V. JANE PICKARD ET AL., APPELLANTS.

FILED JULY 1, 1902. No. 11,989.

Commissioner's opinion. Department No. 1.

Mortgage Foreclosure: OBJECTIONS TO APPRAISAL: BILL OF EXCEPTIONS QUASHED: REVIEW. Where bill of exceptions is quashed, and sheriff's return of sale of mortgaged premises shows compliance with the law, no objections that appraisal was too low and was fraudulent, can be considered.

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APPEAL from the district court for Douglas county. Tried below before KEYSOR, J. *Affirmed.*

John W. Cooper, for appellants.

T. J. Mahoney and *J. A. C. Kennedy*, *contra.*

HASTINGS, C.

This is an appeal from an order confirming the sale of real estate made in a suit to foreclose a mortgage upon certain lands in Douglas county. Objections were filed to the appraisalment on behalf of all the defendants on the following ground:

"Because the appraisalment made on the date aforesaid is too low, and far below the real and true market value of said real estate, so much below the true market value thereof that a fraud has been perpetrated on the said defendants, and their interests in said real estate prejudiced and greatly jeopardized."

This objection was overruled by the trial court. It seems to have been supported by certain affidavits, which were attempted to be preserved in a bill of exceptions, but the latter has been quashed. The return of the sheriff shows an "impartial appraisalment duly made." With the bill of exceptions quashed, there is nothing to support the objection and the action of the trial court must be presumed correct.

Appellant's brief claims that the appeal is taken from the original decree of foreclosure. That decree was entered May 1, 1900; the supersedeas bond recites that the appeal is from the order of confirmation, and the record was filed in this court April 12, 1901. There was evidently no appeal in time from the decree of foreclosure, and it is not necessary to consider appellant's claim in that behalf.

It is recommended that the action of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

Murray v. Allerton.

91-578

PATRICK MURRAY V. SAMUEL W. ALLERTON.

FILED JULY 1, 1902. No. 12,006.

91 NW 578

Commissioner's opinion, Department No. 2.

1. **Trial: EXCLUSION OF WITNESSES: DISOBEYANCE OF ORDER BY WITNESS: EFFECT ON PARTY CALLING HIM.** The fact that a witness has disobeyed an order for the separation and exclusion of witnesses will not operate to deprive the party whose witness he is of the benefit of his testimony if such party is himself without fault.
2. **Trial: EXCLUSION OF WITNESS: KNOWLEDGE OF PARTY OF DISOBEYANCE OF ORDER: EFFECT.** But where the order has been disobeyed with the knowledge or consent or by the procurement of the party seeking to use the witness, the court may in its discretion refuse to admit the testimony.
3. **Appeal and Error: FINDING OF FAULT OF PARTY WHERE ORDER SEPARATING WITNESSES IS VIOLATED.** As the trial court is in a better position to pass on the question how far a party has been at fault in case of violation of an order separating witnesses, this court will not interfere with its determination if it may be sustained by any inference reasonably deducible from the evidence.

ERROR from the district court for Platte county. Tried below before GRIMISON, J. *Affirmed.*

Reeder & Albert, for plaintiff in error.

H. C. Vail, *contra*.

POUND, C.

The sole question presented is whether the trial court erred in refusing to permit one of defendant's witnesses to testify. At defendant's instance, the court had made an order for the separation of witnesses, excluding them from the court room during the progress of the trial. It appeared that the witness in question had been in the room and heard material portions of the testimony notwithstanding said order. While there has been some conflict on the point, the rule generally recognized seems to be that the violation of such an order by a witness will not deprive the party, whose witness he is, of the benefit of his testi-

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mony, if the party himself is without fault. 1 Thompson, Trials, section 281; *Holder v. United States*, 150 U. S., 91; *State v. Sumpter*, 153 Mo., 436, 55 S. W. Rep., 76; *State v. Kissock*, 111 Ia., 690, 83 N. W. Rep., 724. But where the order has been disobeyed with the knowledge or consent or by the procurement of the party seeking to use the witness, the court may in its discretion refuse to admit the testimony. *Mangold v. Oft*, 63 Neb., 397, 88 N. W. Rep., 507; *Commonwealth v. Crowley*, 168 Mass., 121, 46 N. E. Rep., 415; *Kelly v. Atkins*, 14 Colo. App., 208, 59 Pac. Rep., 841. The trial court is in a much better position to pass on the question how far a party has been at fault where such an order is violated than we can be. Hence we ought not to interfere with its determination if such determination may be sustained by any inference reasonably deducible from the evidence. In this case, the showing made by defendant disclosed that the witness in question had been sitting in front of the defendant himself three or four rows distant. While defendant says he did not see the witness, the contrary may have been perfectly obvious to the trial judge from the situation before his eyes in the court room. The same difficulty had previously arisen as to two other of defendant's witnesses, and it is clear that no great diligence was had to see that the order was obeyed. We think the case called for exercise of the court's discretion and we cannot say that it was abused.

We recommend that the judgment be affirmed.

BAERNES and OLDHAM, CC., concur.

AFFIRMED.

Wheeler & Wilson Mfg. Co. v. Winnett.

THE WHEELER & WILSON MANUFACTURING COMPANY V.
HUDSON J. WINNETT.

FILED JULY 1, 1902. No. 12,008.

Commissioner's opinion. Department No. 2.

1. **Contracts: CONSTRUCTION OF WORD "PROCEEDS."** The word "proceeds" is a word of equivocal import. Its construction depends very much upon the context and the subject-matter to which it is applied.
2. **Contracts: EVIDENCE: SUFFICIENCY TO SUSTAIN CONSTRUCTION OF TRIAL COURT.** Evidence and contract examined, and *held* that the construction given to the contract and the meaning ascribed to the word "proceeds" therein by the trial court, are reasonable and should be approved.

ERROR from the district court for Lancaster county.
Tried below before FROST, J. *Affirmed.*

A. W. Lane, for plaintiff in error.

Stewart & Munger, contra.

BARNES, C.

This action was commenced in the district court for Lancaster county by the defendant in error to recover of the plaintiff the sum of \$188.29, and interest thereon from the 20th day of June, 1899. The action was based upon the following facts, and a certain contract hereinafter set forth. It appears that prior to October 23, 1895, one A. F. Leiss, who was engaged in the business of selling sewing machines and musical instruments in Lincoln, Nebraska, was indebted to both parties to this suit. It also appears that Leiss had theretofore given a bond to the plaintiff in error on which the defendant was surety, with a contingent liability thereon in favor of the plaintiff; that Leiss had given both parties a chattel mortgage on his stock, and had turned over to the defendant, Winnett, certain notes and contracts as collateral security for his contingent liability above mentioned; that the face value of the notes and con-

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tracts so held by Winnett as collateral was about \$2,500. On October 23, 1895, the parties came together and, in settlement of their several claims against Leiss and each other, entered into the following agreement, to wit:

"Articles of Agreement between the Wheeler & Wilson Manufacturing Company, a corporation of the state of Conn., and Hudson J. Winnett of Lincoln, Nebraska, made this 23d day of October, 1895, witnesseth: that whereas, the said H. J. Winnett has a note secured by chattel mortgage from A. F. Leiss to secure the sum of \$1,624.30, represented by a promissory note of said Leiss for said amount now owing said Winnett, and also has taken collateral notes from said Leiss to indemnify said Winnett from any liability of said Winnett to the said Wheeler & Wilson Manufacturing Co., arising out of any claims and demands they may have against said Winnett as debtor or surety or in any other way whatever.

"Now therefore, it is agreed that;

"1st. The said Wheeler & Wilson Manufacturing Co., in consideration of the agreements herein do hereby release and discharge the said Winnett from any and all liability to said company arising or claimed on any account or debt or claim of any kind whatever, and hereby surrenders to said Winnett all evidences of indebtedness.

"2d. The said Winnett assigns and turns over to said Wheeler & Wilson Manufacturing Co. without recourse, his said note and mortgage securing same for \$1,624.30 from said Leiss.

"3d. Said Winnett also assigns and turns over without recourse all collateral notes and contracts held as security from said Leiss for said possible liability of Winnett.

"4th. The said collateral notes and contracts are to be held by the Wheeler & Wilson Company in trust for the following purposes:

"1st. To pay out of the first proceeds derived from their collection the sum of \$200 owing the Chicago Cottage Organ Co., or such part as may be unpaid of the \$200 to the Chicago Cottage Organ Company.

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"2d. To next pay out of the said proceeds of the collection of said collateral notes and contracts the sum of \$1,300 to said Winnett, a debt owing him from said Leiss. When said sum of \$1,500 is paid the said Winnett has no further interest in said collateral.

"3d. The said collateral is to be left with Abbott, Selleck & Lane to collect, and the collection is to be without expense to said Winnett in any way, and the \$1,300 is to be paid to said Winnett out of the proceeds of said collection as fast as collected by said Abbott, Selleck & Lane.

"Witness our hands this 23d day of October, 1895."

It further appears that said collateral notes and contracts were placed in the hands of Abbott, Selleck & Lane, as provided by the terms of said contract, who thereafter collected a portion of the same and turned over to the Chicago Cottage Organ Company the \$200 mentioned in the agreement in full, according to its terms; that the whole amount collected by the attorneys was \$996.51; that the sum of \$188.29 was retained by them for fees and expenses incurred in collecting the several claims which went to make up that amount; that the \$996.51, less the \$200 paid to the organ company and the fees and expenses thus retained, were turned over to Winnett. It incidentally appears that nothing more can be collected on the collateral notes and contracts, and when such fact became evident, Winnett brought this suit to recover of the plaintiff in error the sum so retained by the attorneys out of the collections made as aforesaid. The cause was tried to the court, without a jury, and resulted in a judgment for Winnett and against the sewing machine company, the plaintiff herein. Plaintiff's motion for a new trial was overruled, and it thereupon prosecuted error to this court.

There is no controversy between the parties as to the reasonableness of the amount retained by the attorneys for collection fees and expenses, and the only question involved in this case is a proper construction of the contract under all of the circumstances surrounding the making thereof. It is contended on the part of the plaintiff in

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error that it was entitled to retain out of the collections so made, the proper and necessary attorneys' fees and expenses incurred therein; that the contract should be construed to mean the net proceeds of the collections. On the other hand it is contended by the defendant in error that the proper construction of the contract is, that he should receive the gross amount collected after the payment of the \$200 to the Cottage Organ Company; that the word "proceeds" in the contract should be construed to mean the gross amount collected without any deduction for expenses and attorneys' fees, and insists that the part of the agreement which reads as follows, to wit: "The said collateral is to be left with Abbott, Selleck & Lane to collect, and the collection to be made without expense to said Winnett in any way, and the \$1,300 is to be paid to said Winnett out of the proceeds of said collection as fast as collected by said Abbott, Selleck & Lane" was inserted for the purpose of giving to him the gross proceeds of the collateral notes and contracts until he should receive his \$1,300 in full. The district court, with the evidence before it upon a consideration of the contract, held that the plaintiff in error was not entitled to retain anything, or permit the attorneys to retain any of the money collected for fees and expenses incurred, until Winnett should receive full payment of his \$1,300. Plaintiff in error contends that the court erred in giving the contract such construction, and in its findings and judgment for the plaintiff in the court below.

1. "The word 'proceeds' is a word of equivocal import. Its construction depends very much upon the context and the subject-matter to which it is applied." 19 Am. & Eng. Ency. Law. [1st ed.], page 221, note 2. When we speak of the proceeds of a sale we mean the sum that is paid for the things sold. When we speak of the proceeds of a note we ordinarily mean the amount due or collected upon it. When we send a note to an attorney for collection with instructions to collect it and remit the proceeds, it is usually inferred that he will retain his collection fee, and the pro-

ceeds in such a case may be held to be the amount remitted after deducting such fee. It would seem in this case that the defendant in error, in order to avoid such common understanding, required the insertion of the words "and the collection is to be without expense to said Winnett in any way" in the agreement before he would sign it. He testified upon that point as follows: "Now, as I remember it, Mr. Munger had written this contract down to the sentence where it says 'said collateral is to be left with Abbott, Selleck & Lane to collect'; then I made the objection to Mr. Flannery that the whole amount might be spent in the collection of it, and he and I then had some conversation as to whether I was to be at any expense or not, and Mr. Flannery said to me that if they did not expect this \$2,500 of notes—if they did not expect to get \$600 or \$700 out of these notes they would turn them over to me and let me collect them, but as they expected to get \$700 or \$800 out of them they were willing to release me from any expense of collection. Then I asked Mr. Munger to add something to that effect to the contract, and he wrote that sentence, 'without expense to said Winnett in any way.' I knew nothing about the amount that was to be paid to Mr. Lane or Abbott, never asked Mr. Flannery, he spoke to Abbott & Lane about it."

This evidence is in part denied by Flannery in his deposition, which is in the record in this case, and in part corroborated by other witnesses. In addition to this it appears that Abbott, Selleck & Lane paid the Chicago Cottage Organ Company its \$200 in full, reserving nothing whatever for collection fees or expenses. While this may not be sufficient to show that the attorneys acting for the plaintiff in error have placed a construction upon the contract, and upon the word "proceeds," yet it may be treated as a circumstance tending to establish the mutual understanding of the parties as to the meaning of the contract upon that point.

The trial court, with the evidence before it and with better opportunities for determining the question than we

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have, construed the meaning and effect of this agreement to be that the defendant in error was entitled to receive all the money collected upon the collateral notes and contract, after the payment to the Organ Company of \$200, until he was paid his \$1,300 in full, and that the word "proceeds" meant, in the connection in which it was used, the gross amount of the collection. It may be conclusively presumed that had the amount collected exceeded the sum of \$1,500 nothing would have been deducted from the \$1,300 payable to the defendant, Winnett, for collection fees and expenses. In that event such fees and expenses would in fact have been paid by the plaintiff out of its share of the money collected, and this action would never have been commenced. The mere fact that not enough was realized out of the collateral notes and contracts to pay Winnett and the collection fees and expenses, will not change the meaning or terms of the agreement. The situation may be an unfortunate one for the plaintiff, but we do not see how we can relieve it from the conditions entailed by its own agreement. We are unable to say that the court in its construction of the contract was clearly wrong. Even where a contract may be fairly susceptible of two different meanings, or two constructions, which we do not hold this one to be, and the trial court has placed its construction thereon, if we are unable to say that the judgment and finding of the trial court was clearly wrong, there is no reason why we should attempt to substitute therefor another construction and thus reverse the findings and judgment of the lower court.

For the foregoing reasons we recommend that the finding and judgment of the district court be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

Locke v. Skow.

JOSEPH L. LOCKE V. JAMES J. SKOW.

FILED JULY 1, 1902. No. 12,009.

Commissioner's opinion. Department No. 1.

1. **Forcible Entry and Detainer: PLEADING: COMPLAINT IN LANGUAGE OF STATUTE.** Complaint in forcible entry and detainer is sufficient if substantially in the words of the statute. *Blachford v. Frenzer*, 44 Neb., 829.
2. **Forcible Entry and Detainer: JUDGMENT: SUFFICIENCY.** Judgment in forcible entry and detainer is sufficient if it is for restitution "of the premises described in the complaint" where the complaint is for a specifically described portion of land.

ERROR from the district court for Gage county. Tried below before STULL, J. *Affirmed.*

J. N. Rickards and *J. E. Cobbe*; for plaintiff in error.

Babcock, Sackett and *Spafford*, *contra.*

HASTINGS, C.

The only error complained of in this case is the action of the district court in finding no error in the proceedings of the county court of Gage county, and dismissing the defendant's petition in error taken from such proceedings, and from a judgment of restitution entered in the county court in favor of the plaintiff, Skow, against the defendant, Joseph Locke, plaintiff in error here. The errors claimed on the part of the county court, which the district court is said to have erred in affirming, are eleven in number. The first four of them relate to admissions of evidence. As there is no bill of exceptions in this case, we have no means of knowing whether such evidence was admitted by the trial court or any objection made to it. The fifth complaint is that no cause of action was stated on plaintiff's behalf against the defendant. This ground of error is still urged, and the further one that the judgment is indefinite and uncertain and does not describe the

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premises named in the complaint. These seem to be all that can be considered in the present situation of this case.

This action was originally taken on appeal from the county court of Gage county, but after this court's decision that there was no right to appeal in forcible detainer cases, leave was obtained to file a petition in error, the result being that nothing but the transcript was brought up from the county court. That transcript does not contain in full the original complaint, which seems to be required to be copied in the record. Code, section 1023. No objection, however, appears to have been made to the failure to copy it in full, and whether or not the complaint stated a cause of action will have to be tested by the abstract of it which appears; that abstract is as follows:

"March 7, 1900, plaintiff files complaint alleging that he is seized in fee simple of the southeast quarter ($\frac{1}{4}$) of section sixteen (16), in town No. three (3) north of range six (6) east, Gage county, Nebraska, and is entitled to the immediate possession thereof, that on or about the 20th day of September, 1899, the plaintiff purchased the above described premises under an order of sale issued from the district court in and for Gage county, Nebraska, in a foreclosure proceeding, foreclosing a certain mortgage given by the defendant. At the time of said purchase the defendant was in possession of said premises, and the plaintiff allowed the defendant to remain thereon, without any definite contract or agreement as to the time of said occupancy.

"During such occupancy the said defendant cultivated about 70 acres of land on the east part of said 160 acres. On or about the 27th day of August, 1899, the plaintiff notified the defendant that he desired possession of said premises, occupied by the defendant, for his own use, after the 1st day of March, 1900, which period has since elapsed and determined, yet the said defendant unlawfully and forcibly detains possession of said premises, and unlawfully and forcibly holds the same.

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"On the 28th day of February, 1900, the plaintiff served on the defendant a notice in writing to leave said premises. Plaintiff asks restitution of said premises and costs of suit."

The facts set forth seem amply sufficient, after verdict, to support a judgment. The decisions in this state are uniform that the complaint need only be in the general terms of the statute. *Blachford v. Frenzer*, 44 Neb., 829; *Moore v. Parker*, 59 Neb., 29; *Blaco v. Haller*, 9 Neb., 149; *Hitchcock v. McKinster*, 21 Neb., 148.

The other error that the judgment is not sufficient does not seem to be well taken. Judgment is as follows:

"It is therefore ordered and adjudged by the court that the plaintiff have restitution of the premises described in said complaint, and that he recover of said defendant his costs herein expended, taxed at \$17.70."

This is very brief, but the complaint was for a definite quarter section of land, and the judgment will be held to apply by its reference to the premises described in the complaint.

It is recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

STORER & ELLIS V. BOGGS BROTHERS.

FILED JULY 1, 1902. No. 12,015.

Commissioner's opinion. Department No. 3.

Appeal and Error: MECHANICS' LIENS: DECREE SUSTAINED BY PLEADINGS AND FINDINGS. Findings of the court examined, and held to be sustained by the pleadings and sufficient to support the decree.

ERROR from the district court for Nuckolls county. Tried below before STUBBS, J. *Affirmed.*

S. A. Searle, for plaintiffs in error.

H. H. Mauck and Cole & Brown, contra.

ALBERT, C.

This suit was brought to foreclose a lien for labor and material furnished in the erection of a certain building. The plaintiffs' claim is based on two express oral contracts, and an implied contract to pay the reasonable value of certain "extras" furnished by the plaintiffs. The terms of the express contract are not clearly set forth in the petition. The aggregate amount alleged to be due the plaintiffs is \$342.62, with interest thereon at seven per cent. from the 15th day of December, 1898.

The answer admits that the plaintiffs furnished labor and material for the erection of such building, but alleges that, outside of certain extras, which were furnished and which were of the reasonable value of \$115.92, such labor and material were furnished in pursuance of two express contracts, whereby the plaintiffs undertook and agreed to furnish the material and construct said building for the sum of \$945; that the material should be first-class, and the building erected in a workmanlike manner. It is further alleged that the defendants have paid the plaintiffs on said contracts the sum of some \$888. The answer further alleges that the material furnished under said contracts was not first-class, and that the building was not erected in a workmanlike manner; and that by reason of such breach of the contracts the defendants have been damaged in the sum of \$1,150. The answer concludes with a prayer for judgment against the plaintiffs in the sum of \$1,050.70 and costs. The reply is a general denial.

A trial was had, and the court found and decreed as follows:

"And now at this time, to wit: Monday, April 23, A. D. 1900, it being the first day of the regular April, 1900, term of the district court, this cause again comes on, and the testimony having been submitted and taken at a former term of this court, to wit: at the January, 1900, term of said court, and said cause at that time having been taken under advisement by the court. Whereupon

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and on consideration whereof the court now finds that due and legal personal service by summons has been had and made within the jurisdiction of the court upon the defendants herein.

"That the plaintiffs constructed a one-story brick building for defendants upon the premises mentioned and described in the pleadings.

"The court further finds that the plaintiffs so unskillfully and negligently performed the work upon the said building in question and that said work was such a departure from the contract entered into between the plaintiffs and defendants herein, that said defendants by reason of such gross departure from the contract entered into sustained loss and damage in the sum of \$400, four hundred dollars.

"The court further finds that the defendants owe plaintiffs on the contract price of said building the sum of \$118.92 and that plaintiffs still owe the defendants after allowing said credit of \$118.92 due upon the said contract, the sum of \$281.08 and that defendants are to have judgment therefor.

"The court further finds that the defendants are entitled to have the claim for mechanic's lien canceled and discharged of record and held to be no lien upon the said premises in question.

"It is therefore considered, ordered and adjudged by the court that the defendants have and recover from the plaintiffs herein the sum of \$281.08 and their costs herein taxed at \$—, and that said mechanics' lien be canceled and discharged of record. Plaintiffs except and are allowed forty days to present bill of exceptions." The plaintiffs bring the case here on error. It will be observed that the answer contains a counter-claim for damages. The plaintiffs insist that it does not state a cause of action in that regard. We have not set out the pleadings because of their prolixity. The foregoing, we think, fully reflects the facts shown. The answer shows a contract between the plaintiffs and the defendants, a breach

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thereof on the part of the plaintiffs and resulting damages to the defendants. With the law applicable to the facts stated as the major premise, and the facts stated in the answer reduced to their simplest form, as the minor premise of a logical formula, a judgment for the defendants would necessarily follow. A pleading which will bear that test is sufficient when assailed as in this case.

It is next insisted that the answer is insufficient to sustain the findings of the court. As before intimated, the answer alleges a contract between the parties, a breach thereof on the part of the plaintiffs, and that the defendants thereby sustain certain damages. The findings clearly respond to these allegations.

It is further urged by the plaintiffs that the findings do not support the decree. The court found the amount due the plaintiffs on their cause of action, and the amount due the defendants on their counter-claim; the decree is in favor of the defendants for the balance found due them on their counter-claim after deducting the amount found due the plaintiffs on their cause of action. So far, certainly, the findings support the decree. But complaint is made because the decree, in express terms, cancels the plaintiffs' lien, when the answer asks no equitable relief. The effect had been the same had that provision been omitted; the lien would have been canceled by operation of law. The decree is fully sustained by the findings.

It is therefore recommended that the decree of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

Priel v. Adams.

PATRICK PRIEL V. ANNIE ADAMS.

FILED JULY 1, 1902. No. 12,037.

Commissioner's opinion. Department No. 2.

1. **Bastardy: PROOF OF BIRTH: PRESUMPTION.** In a prosecution for bastardy when it is proven that a child was born upon a certain day it may be inferred that it was born alive.
2. **Bastardy: CIVIL PROCEEDING: EVIDENCE, PREPONDERANCE OF.** A prosecution for bastardy is a civil and not a criminal proceeding; hence, the paternity of the child need only be established by a preponderance of the evidence and it is not necessary that it should be established beyond a reasonable doubt.
3. **Bastardy: INSTRUCTIONS: SUFFICIENCY.** Instructions examined, and *held* not prejudicial.
4. **Bastardy: EVIDENCE: SUFFICIENCY.** Evidence examined, and *held* sufficient to support the judgment.

ERROR from the district court for Dawson county.
Tried below before SULLIVAN, J. *Affirmed.*

E. A. Cook, for plaintiff in error.

H. D. Rhea and *W. W. Leek*, *contra.*

OLDHAM, C.

This was a proceeding in bastardy. In a trial to a jury in the court below defendant was found guilty and judgment was entered on this verdict against the defendant adjudging him to be the reputed father of the bastard child of the plaintiff and ordering him to pay to plaintiff the sum of \$1,000 in various installments. From this judgment defendant brings error to this court.

It is first contended by defendant that there is no evidence in the record that a living child was born to the plaintiff. All the evidence that appears in the record upon this question is found in the testimony of the prosecutrix as given in the district court and as given on the preliminary examination before the justice of the peace and duly

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certified to and read in evidence in the district court. Her testimony on this question in the district court is as follows:

Q. When was the child born?

A. August 25, 1899.

Q. Who is the father of that child?

A. Patrick Edward Priel.

And at the preliminary examination she testified as follows:

Q. Have you been pregnant with a bastard child?

A. Yes, sir.

Q. When were you delivered of the child?

A. Born August 25, 1899.

Q. State who is the father of the child.

A. Patrick Edward Priel.

Defendant contends that this evidence does not establish beyond a reasonable doubt the fact that the child was either born alive or was living at the time of the trial of this case in the court below. We think that this view misinterprets the nature of the proceeding and confuses it with an action purely criminal in its nature and governed by the rules of pleading and practice prescribed by the Code of Criminal Procedure. Instead of this it is an action, at most, but *quasi*-criminal in its nature and governed by the provisions of chapter 37 of the Compiled Statutes.

In a proceeding of this nature in the state of Illinois the identical question of the sufficiency of the proof of the birth of a living child, under testimony similar to the evidence in this record, was before the supreme court of that state in the case of *Mann v. People*, 35 Ill., 467, and the court in discussing the nature of the action and the sufficiency of the proof said:

"If it be civil, then the measure of evidence is different from what it would be if it were criminal. In the former, a mere preponderance is sufficient, whilst in the latter, the evidence must exclude all reasonable doubt of guilt to warrant a conviction. Then does this evidence preponderate in favor of the guilt of the plaintiff in error? The witness

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testifies that the child was born on a specified day. And when we apply, as the jury had a right to do, the teachings of observation, they must know that a large majority of births are of living children. This is the general course of nature and the jury had the right to take it into consideration in weighing the evidence. When added to the evidence, it preponderated in favor of the child being born alive. A different rule may prevail in criminal prosecutions, but we think it legitimate in civil causes of this description. And if the child had not been living at birth, or had since died, it only required the asking of a single question of the prosecuting witness to have shown the fact." See also *Trawick v. Davis*, 4 Ala., 328; *Satterwhite v. State*, 32 Ala., 578.

The next objection urged is that the testimony of the prosecutrix did not show that she was unmarried at the time the child was begotten. The prosecutrix testified at the preliminary examination that she was an unmarried woman; she also testified to this fact at the trial in the district court, and in answer to a question propounded by the trial judge, she said that she was never married. This certainly was sufficient to establish the fact that she was unmarried at the time the child was begotten.

The criticism of instructions given by the trial court on its own motion is without merit. The defendant requested no instructions although he was represented at the trial by many and able counsel, and the instructions given covered every legitimate issue tendered by the plea and proof offered by the defendant. The court instructed in substance that to find the defendant guilty the jury must find that plaintiff was an unmarried woman and the mother of a bastard child born alive and that she was a resident of Dawson county; and that they must find from a preponderance of the evidence that the defendant was the father of the child. If defendant desired any more specific instruction on each of the elements of the offense he should have asked for it. The defendant was present at the trial with his attorneys and a number of witnesses,

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many of whom lived in the immediate neighborhood of the prosecutrix and if there had been any doubt about the birth of the child alive or about the fact that the prosecutrix was an unmarried woman there was nothing to hinder him from introducing evidence on these questions or from cross-examining the prosecutrix with reference to these facts. But this he did not do. The testimony of the prosecutrix was strongly corroborated as to defendant's long association with her and as to the fact that he had been keeping company with her for four or five years before the child was begotten, and as to admissions he made as to the paternity of the child while the prosecutrix was in travail, and we have no doubt, after an examination of the testimony contained in the bill of exceptions, that the verdict of the jury is supported by a very decided preponderance of the evidence.

We therefore recommend that the judgment of the district court be affirmed.

POUND and BARNES, CC., concur.

AFFIRMED.

SAMUEL H. REED, APPELLEE, v. JOHN T. HOPKINS ET AL.,
APPELLANTS, IMPEADED WITH SARAH G. FOOTE ET AL.

FILED JULY 1, 1902. No. 12,043.

^{91 NW 1126}
Commissioner's opinion. Department No. 2.

Mortgage Foreclosure: OBJECTIONS TO APPRAISAL MADE AFTER SALE.

APPEAL from the district court for Douglas county.
Tried below before DICKINSON, J. *Affirmed.*

Hiram A. Sturges, for appellants.

S. A. Searle, contra.

POUND, C.

This is an appeal from confirmation of a sale under decree of foreclosure. The objections going to the appraise-

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ment were not made till after sale and need not be looked into. The only other objection is that the decree "did not include costs to time of decree and therefore was not a final decree." This is too frivolous to merit comment. We recommend that the order appealed from be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

THE CITY OF SOUTH OMAHA V. JAMES BURKE, BY EDWARD
BURKE, HIS NEXT FRIEND.

FILED JULY 1, 1902. No. 12,044.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: REJECTION OF EVIDENCE: OFFER OF PROOF.** To secure a review in this court of a rejection of evidence, an offer of the proof sought to be elicited by the refused question must be made.
2. **Municipal Corporations: DUTY AS TO CONDITION OF STREETS WHEN REPAIRING.** "The duty ordinarily resting on a city to maintain its streets and side-walks in a reasonably safe condition for travel in the ordinary mode is remitted during the time occupied in making repairs and improvements." *City of Lincoln v. Calvert*, 39 Neb., 305.

ERROR from the district court for Douglas county.
Tried below before SLABAUGH, J. *Reversed.*

W. C. Lambert, for plaintiff in error.

I. J. Dunn, *contra.*

HASTINGS, C.

From a verdict and judgment in favor of James Burke, plaintiff below, the city of South Omaha brings error to this court. The action was to recover, \$15,000, alleged damages for an injury caused to the plaintiff by being thrown from a milk wagon, as he claims, through negligence of the defendant city. He says that on November 25, 1897, a trench two and a half feet wide and four to ten

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feet deep had been dug near the center of N street from Twenty-third to Twentieth streets in the defendant city, and left open and unguarded for several months and was in a dangerous condition, of which the city officials had notice, and that such condition existed long enough for the city in the exercise of ordinary care to have rebuilt or erected safe-guards; that in riding in the milk wagon with Edward Burke, his father, along 23d street, the horses became frightened and started to run; that the driver was unable to control his horses sufficiently to cross in safety the narrow space left between the ends of the trench; the right wheels of the wagon ran into the ditch, throwing the plaintiff ten or twelve feet upon a hard pavement; that the fall injured the right side of his face and head, right eye, right arm and right leg, caused nervousness affecting his entire system and destroying control of his muscles, affected his disposition and rendered him irritable; caused him to wake in the night with terror and produced spasmodic movements of the face and arm, drawing his mouth to the left side and permanently injuring the right eye and the right side of the face; that the injury was without negligence on plaintiff's part, and through negligence of defendant in leaving the trench open, and the injury to his eye and nervous system are permanent. The city admitted its incorporation, admitted the plaintiff's filing a claim for damages; denied generally, and alleged that any injury sustained by plaintiff was due to his own negligence. The jury returned a verdict for \$3,000; a motion for new trial was made, among other grounds for excessive damages, and plaintiff was required to file a *remittitur* of \$1,500, which was done, and judgment thereupon rendered in plaintiff's favor for \$1,500 and costs.

The first error discussed in the city's brief is the rejection of evidence that the barricades and signals placed along the trench were the ordinary and usual ones employed in safeguarding such excavations. It does not seem necessary to discuss the complaint, as no tender of

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evidence was made when the court sustained the objection to defendant's inquiry. Counsel insists that it sufficiently appears from the question asked what was desired; that may be, but it does not appear from the question asked what he was able to prove or would have proved had he been allowed. The repeated decisions of this court that an offer of testimony must be made in order to predicate error upon a rejection of a question, seem to dispose of this complaint. A few of such decisions are, *Barr v. City of Omaha*, 42 Neb., 341; *Ford v. State*, 46 Neb., 390; *Morsch v. Besack*, 52 Neb., 502.

Many exceptions were taken to the charge of the court. It is complained that sections 7, 11 and 14 of the court's charge were erroneous in leaving out the element of notice to the city of the defect. The instructions certainly do omit entirely the element of notice, which is alleged in the petition; they predicate the right to recover on the negligence of the city and the absence of contributory negligence in the plaintiff, but we are not satisfied that there was error in this respect. It appears from the evidence that the excavation was made by parties holding a gas franchise, or claiming to hold one, which the city had granted, and that they were authorized by the city to excavate in the street; it is true that the gas company was not employed by or doing work for the city as in the case of *City of Beatrice v. Reid*, 41 Neb., 214, and *City of Lincoln v. Calvert*, 39 Neb., 305. It is true, however, that the gas company had been authorized by the city authorities to do work necessarily involving excavation in the street and the city was undoubtedly chargeable with notice of what was done by its authority. Such is the holding in *Russell v. The Inhabitants of the Town of Columbia*, 74 Mo., 480. But if the city is to be held liable for the condition of the streets caused by the improvements which it authorizes, it is also entitled to immunity from the requirement to maintain safe streets while the improvements are going on. *City of Lincoln v. Calvert*, 39 Neb., 305.

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In the present case the following instruction was given and excepted to:

"It is the duty of a city to keep its streets in a reasonably safe condition for public travel in the ordinary modes, and if it fails to do so and a person lawfully thereon is injured thereby, the city is liable unless the person injured was guilty of negligence which contributed to his injuries, and this is true, although a person be injured because of a defect in such street caused by another than the city."

In *City of Lincoln v. Calvert*, last cited, injury resulted from the presence of a stone lying across the pathway; the plaintiff in that case stumbled upon the stone and fell, suffering a severe injury; an instruction, in terms almost identical with those of the one above, indicating a requirement that the city maintain reasonably safe side-walks, and that if the walk was in a dangerous condition and plaintiff was injured upon it, without negligence on his part, the city was liable, was held erroneous. The charge as to the general duty to maintain a reasonably safe condition was held to be ordinarily accurate, but as having no application to a street undergoing improvements. The instructions objected to in the case at bar are such as are applicable to a street in which no improvements are under way. As is stated in *City of Lincoln v. Calvert*, the city had the right for a reasonable time, and to a reasonable extent, to render its streets unsafe in the effort to make them safer. It would have the same rights in an effort to make them lighter. The question submitted to the jury by the instructions in this case was not whether the city had been reasonably cautious in making this improvement and reasonably expeditious in completing it, but whether the street in its then condition was reasonably safe for travel. This was just as erroneous in the present case as in that of *City of Lincoln v. Calvert*.

It is clear that the above instruction, that the city was liable if an injury, owing to an unsafe condition of the street, occurred to one not guilty of contributory negli-

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gence, completely ignores the whole question of the right of the city to repair or improve the street, and impair its safety in so doing. It can only be upheld in this case by assuming, as the trial court evidently did, that the condition was due to negligence, and was not a reasonably necessary result of the laying of the gas-pipes. Evidently the gas-pipes could not be laid below the surface of the street without excavation. The only evidence of negligence which was offered was the proof that the excavations stood without barricades other than the pavement and soil taken out, from early in October until November 25, when the accident occurred. It appears that the excavation was made in about two or three days. Possibly the trial court assumed that a like time was all which was needed to fill them and any longer delay was, *per se*, negligence. It sufficiently appears, however, that an injunction was granted against proceeding with the work. In our opinion the evidence does not disclose a state of facts which justified the court in saying that the mere fact of the street not being "in a reasonably safe condition for travel in the ordinary modes" was negligence on the city's part.

Instruction 7, above given, certainly bears no other construction. The real duty of the city, if the doctrine of *City of Lincoln v. Calvert* is to be upheld, was to have the gas-pipe laid with only reasonable impairing of the safety of the streets. Whether or not it was the city's duty to see that the work was completed by the time of this accident, or whether the work was being done with reasonable regard to safety was not submitted to the jury, but only the question of whether it was a reasonably safe street considered without reference to the work of laying the pipe.

The question as to contributory negligence, also raised by plaintiff in error, it is not worth while to discuss. The trial court seems to have submitted it fairly to the jury, and we are not prepared to say that the jury's finding is unsupported by the evidence.

For the failure to note the right of the city to reason-

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ably interfere with the safety of its streets in making improvements, it is recommended that the judgment of the trial court be reversed, and the cause remanded for further proceedings.

DAY and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

Opinion on rehearing follows.

THE CITY OF SOUTH OMAHA V. JAMES BURKE, BY EDWARD BURKE, HIS NEXT FRIEND.

FILED APRIL 7, 1903. No. 12,044.

Commissioner's opinion. Department No. 3.

Appeal and Error: INSTRUCTIONS: CONSTRUCTION OF PARAGRAPHS. The different paragraphs of the charge to a jury are to be construed together, and if, when thus construed, they correctly state the law applicable to the facts, a judgment will not be reversed because of omissions in a paragraph, which does not purport to cover the entire case.

REHEARING of case reported *ante*, page 309.

ERROR from the district court for Douglas county. Tried below before SLABAUGH, J. *Judgment below affirmed.*

W. C. Lambert, for plaintiff in error.

I. J. Dunn, *contra*.

ALBERT, C.

This is a rehearing. The former opinion is reported *ante*, page 309, and in 91 N. W. Rep., 562. That opinion closes with these words: "For the failure to note the right of the city to reasonably interfere with the safety of its

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streets in making improvements, it is recommended that the judgment of the trial court be reversed."

The foregoing conclusion is based exclusively on a construction of the seventh paragraph of the charge to the jury, which is set out in that opinion. Were that instruction the only one given, touching the duties and liabilities of the city in the premises, or, if it purported to be a complete exposition of the law applicable to the facts in the case, we should be disposed to concur in the conclusion reached in the former opinion. But the trial court did not stop with that paragraph; on the contrary, it added the following:

"IX. The duty ordinarily resting upon the city to keep its streets in reasonably safe condition for public travel does not exist during the time occupied in making public improvements or repairs in or upon such streets, and such city is relieved from liability from such conditions as are reasonably necessary for the purpose of performing the work and for the time reasonably required for its performance, and while such improvements are in progress in or upon the streets of a city the city must exercise reasonable care to protect those properly and lawfully upon such streets from the consequences of any unsafe condition that may exist."

By the paragraph just quoted, it seems to us that the jury were pointedly advised of the right of the city to interfere, in a reasonable manner, with the safety of its streets in making improvements thereon, and of its duties and liabilities under such circumstances, so far as pertains to the facts in this case. It is a familiar rule that instructions are to be construed together. *Schmitt & Brother v. Mahoney*, 60 Neb., 20; *Nelson v. Jenkins*, 42 Neb., 133; *Blakeslee v. Ervin*, 40 Neb., at page 135; *Martin v. State*, 30 Neb., 507. Paragraph 7 does not purport to cover the entire case; it is merely a statement of the general rule as to the duties and liabilities of a city in respect to its streets. Followed as it is by the paragraph hereinbefore set out, and construed with it, as it must be, we are satisfied that

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there was no "failure to note the right of the city to reasonably interfere with the safety of its streets in making improvements," and that the conclusion reached in the former opinion is wrong. In the former opinion all other questions were resolved in favor of the defendant in error. On these questions we fully concur in the views expressed. Such being the case, and the ground upon which the judgment of reversal is based being in our opinion untenable, we recommend that such judgment be vacated, and that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

The former judgment of reversal entered in this court in this cause is reversed, and the judgment of the district court affirmed.

JUDGMENT BELOW AFFIRMED.

THE NATIONAL BLACK RIVER BANK OF PROCTORVILLE, VERMONT, APPELLEE, v. AARON WALL, APPELLANT, ET AL.

FILED JULY 1, 1902. No. 12,050.

Commissioner's opinion. Department No. 2.

Mortgage Foreclosure: ORDER OF SALE: COMPLETION BY SHERIFF AFTER TERM. Where an order of sale in a foreclosure proceeding has been regularly issued and placed in the hands of a sheriff of the county in which it was issued during his term of office; he may complete the execution of such order of sale after the expiration of his term.

APPEAL from the district court for Sherman county. Tried below before SULLIVAN, J. *Affirmed.*

Aaron Wall, for appellant.

C. A. Bemis and H. M. Mathew, contra.

OLDHAM, C.

This is an appeal from the confirmation of a sale in a foreclosure proceeding. But one objection to the regu-

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larity of the sale is called to our attention by the brief of the appellant. On the 3d day of January, 1900, an order of sale was issued on a decree of foreclosure regularly entered by the district court for Sherman county, Nebraska, and delivered to H. G. Patton, sheriff of said county. On the 4th day of January the term of office of sheriff Patton expired and he turned over and surrendered his office to his duly elected and qualified successor, but proceeded to execute the order of sale which had been delivered to him before the expiration of his term of office as sheriff; and it is claimed by the appellant that the retiring sheriff had no authority to do so, and that his acts in appraising the lands and conducting the sale after his term of office had expired are without proper authority and void, and that for this reason the sale should be set aside.

Section 123, article 1, chapter 18, Compiled Statutes, provides that "Sheriffs and their deputies may execute any process which may be in their hands at the expiration of their office," etc. This court held in the case of *Holmes v. Crooks*, 56 Neb., 466, 76 N. W. Rep., 1073, that "an order of sale comes within the term 'process' as used in this section of the statute," citing *Philips v. Spotts*, 14 Neb., 139, in support of this conclusion. While it is true that the decision in *Holmes v. Crooks*, *supra*, was based on a record in which the appraisalment had been made and the process partially executed before the sheriff's term of office had expired, yet the language of the statute plainly confers the right to execute any process that may be in the hands of the sheriff at the time of the expiration of his term of office, whether such process has been partially executed or not, and we therefore recommend that the judgment of the district court be affirmed.

POUND and BARNES, CO., concur.

AFFIRMED.

Parker v. Taylor.

CHARLES M. PARKER, ADMINISTRATOR WITH WILL ANNEXED
OF THE ESTATE OF JOHN E. HAAS, DECEASED, v. WAL-
LACE TAYLOR.

FILED JULY 1, 1902. No. 12,054.

Commissioner's opinion. Department No. 1.

1. **Action: ASSIGNMENT OF INTEREST DURING PENDENCY: PARTIES.** Where the interest of the plaintiff is transferred to another during the pendency of the cause, the suit may be prosecuted to its termination in the name of the original plaintiff, or the transferee may be substituted as plaintiff.
2. **Appeal and Error: INSTRUCTIONS NOT BASED UPON EVIDENCE.** Instructions to the jury must be based upon and be applicable to the evidence; and it is not error to refuse to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred.
3. **Bills and Notes: EVIDENCE OF EXTENSION OF TIME OF PAYMENT: SUFFICIENCY.** Evidence examined, and *held* not to support the claim that time of payment of notes had been extended.

ERROR from the district court for Lancaster county.
Tried below before FROST, J. *Affirmed.*

Willard E. Stewart and Allen W. Field, for plaintiff in error.

Ricketts & Ricketts, contra.

DAY, C.

Wallace Taylor filed his claim in the county court of Lancaster county against the estate of J. E. Haas, based upon three promissory notes payable to the order of said Taylor and signed by P. A. Bowman and J. E. Haas. The claim was allowed in the county court as filed, less the sum of \$1,800 which had been paid thereon since the filing of the claim. From the order of allowance an appeal was taken to the district court, where, upon trial, a judgment was rendered in favor of Taylor for \$233.83. To review this judgment Charles M. Parker, administrator of said estate, brings error to this court.

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The petition is in the usual form of an action to recover upon promissory notes, and, after crediting the payment of \$1,800, alleges there is due the plaintiff upon said notes \$200 with interest from October 12, 1897, at ten per cent. A number of defenses are alleged in the answer, but only those argued in the briefs will be considered. The answer alleges that the plaintiff was not the real party in interest; that Haas was surety for Bowman, and that for a valuable consideration the time of payment had been extended to a time certain, without the consent of the said Haas. The reply denied these allegations of the answer.

It is urged that the court erred in refusing to give an instruction requested by the defendant to the effect that, if the jury believed from the evidence that the plaintiff was not the owner of the notes sued on and was not entitled to receive the proceeds of the notes, or any part thereof, then they should find for the defendant. The instruction asked, as an abstract proposition of law, was correct, but as applied to the undisputed evidence upon the question to which it was directed, it had no application and was, therefore, properly refused. The evidence shows without conflict that after the plaintiff had filed his claim in the county court, based upon the notes sued on, he sold the notes to one Katherine Bowman and that she was the real party in interest. Under the provisions of section 45 of the Code of Civil Procedure, it has been held that where the interest of a plaintiff is transferred to another during the pendency of the cause, the suit may be prosecuted to its termination in the name of the original plaintiff, or the transferee may be substituted as plaintiff. *Alexander v. Overton*, 52 Neb., 283; *Harrington v. Connor*, 51 Neb., 214; *Dodge v. Omaha & S. W. R. Co.*, 20 Neb., 280.

It is next urged that Haas was a surety upon the notes and that the date of the payment had been extended to a time certain, for a valuable consideration, without his consent. It is admitted that Haas was a surety, but the extension of the time of payment was denied. Upon this branch of the case there was, likewise, no dispute in the

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evidence. The record shows that Mrs. Katherine Bowman purchased the three notes, and the school land contract which secured the same, from Taylor; that she paid \$1,800 in cash for them, and the balance of the purchase price she agreed to pay on or before January 1, 1899. By her agreement the notes were to remain in the hands of Ricketts & Wilson, attorneys for Taylor, until the balance was paid. We are unable to see how Mrs. Bowman's contract with Taylor operated to extend the time of payment of the notes executed by Bowman and Haas. She had the undoubted right to buy the notes, and Taylor had the right to sell them upon such terms as he saw fit to make. The fact that Taylor extended the time in which Mrs. Bowman was to pay him for the notes beyond the period when the three notes became due can not be considered an extension of the time of payment. Nothing was done by the parties which would have prevented the representatives of Haas from paying the notes and proceeding at once against the estate of Bowman.

The instruction asked by the defendant upon this phase of the case was not based upon and applicable to the evidence, and was therefore properly refused. Instructions to the jury must be based upon and be applicable to the evidence, and it is error to instruct the jury that they may find a material fact, of which there is no evidence for which it may be legally inferred. *Walrath v. State*, 8 Neb., 80; *Neihardt v. Kilmer*, 12 Neb., 35.

There is a claim made on behalf of the defendant estate that the land securing the payment of the notes in controversy was sold by Mrs. Bowman, as administratrix, to plaintiff, Taylor. It is urged that any such sale must have been subject to all liens against the land; that Taylor subsequently made a contract selling the land to Mrs. Taylor, and to do so must clear up the title by releasing the lien of the notes. We are unable to see how the transaction had the effect claimed, or operated as a discharge of the notes. The terms of the administratrix's sale by Mrs. Bowman to Taylor, if there was one, do not appear. It

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seems by the testimony of Taylor's attorney that the sale was made simply to get the title subject to the liens, into the name of Mrs. Bowman. After this was done the sale of the notes and of the land contract to Mrs. Bowman was made. This transaction seems to have had no relation to the administratrix's sale. The latter was only shown incidentally; no record of it was introduced. We are entirely unable to give it any more importance than the parties themselves did at the trial. There is no claim that the full value of the land was not realized in the sale to Mrs. Bowman.

The instructions given by the court seem to have fully and fairly submitted the question raised by the pleadings and the evidence, and the judgment, in our opinion, is clearly sustained by the evidence.

It is recommended that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

ALBERT L. CAMPBELL, TRUSTEE, AND ROBERT C. GEER, AS
EXECUTOR OF THE WILL OF ROBBINS BATTELL, DE-
CEASED, APPELLEES, V. ALBERT GAWLEWICZ, APPELLANT,
ET AL.

FILED JULY 1, 1902. No. 12,055.

Commissioner's opinion. Department No. 2.

1. **Judicial Sales: TERM "PRIOR LIEN" IN CERTIFICATE OF LIENS: TAX LIEN ALWAYS PRIOR.** By law, taxes are made a first lien upon the real estate against which they are levied and assessed. Such lien is superior and prior to all others, and it is not necessary for the county treasurer in his certificate of liens, on judicial sale, to insert the words "prior liens."
2. **Judicial Sales: RETURN FAILED TO SHOW PURCHASER AS EXECUTOR: AMENDMENT.** The return of the sheriff to an order of sale showed that the land was sold to the plaintiff, but failed to state that it was sold to the plaintiff as executor, etc. This failure was corrected by an amended return, held to constitute no grounds for objection to the confirmation of the sale.

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3. **Judicial Sales: PURCHASE BY PLAINTIFF: PAYMENT OF MONEY.** Where, at a judicial sale the land is purchased by the plaintiff, mentioned in the decree, it is not necessary that the sum bid should be actually paid in money to the officer conducting the sale.

APPEAL from the district court for Sherman county. Tried below before SULLIVAN, J. *Affirmed.*

H. M. Mathew, for appellant.

Wall & Williams, contra.

BARNES, C.

This is an appeal from an order confirming a judicial sale of real estate, under a decree of the district court for Sherman county.

1. The appellant contends that the court erred in overruling his motion to set aside the sale, because the treasurer did not state in his certificate of liens that the taxes were liens prior to that of the decree. In answer to this contention it is sufficient to say that by law taxes are made a first lien upon the real estate against which they are assessed and levied. Such lien is superior to all others. No one is so ignorant of the law as to be misled by the absence of the words "prior liens" in such a case, and the court was right in overruling the motion.

2. It is urged that the order of confirmation be set aside, because the sheriff did not state in his original return that he sold the land to the plaintiff in his official or representative capacity, or name. This objection is not tenable, but the force of it, in any event, is obviated by the amended return of the sheriff to the order of sale in which he states that the land was sold to Robert C. Geer as executor, etc. Where the land, at judicial sale, is purchased by the plaintiff it is not necessary that any money should actually be paid to the officer. This disposes of all of the objections urged by the appellant; and, it appearing that he has sustained no injury by reason of any of the matters com-

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plained of, we recommend that the order appealed from be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

JACOB ZIMMERMAN V. KEARNEY COUNTY BANK.

FILED JULY 1, 1902. No. 12,086.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error:** NO ASSIGNMENT OF ERROR IN OVERRULING MOTION FOR NEW TRIAL. A judgment will not be reversed for error of law occurring at the trial, unless it is alleged in the petition in error, and shown by the record, that the court erred in overruling the motion for a new trial.
2. **Appeal and Error:** NO ARGUMENT OF ASSIGNMENTS IN BRIEF OR CITATIONS. Where the plaintiff in error makes no argument in his brief of any of the assignments of error contained in his petition, and no authorities are cited and no reasons given in support of such assignments, the judgment of the trial court should be affirmed.
3. **Appeal and Error:** DIRECTION OF VERDICT WHERE NO OTHER COULD BE SUSTAINED. It is not reversible error for the trial court to direct the jury to return a verdict for one of the parties where, upon the evidence, no other verdict than the one directed can be sustained.

ERROR from the district court for Kearney county.
Tried below before ADAMS, J. *Affirmed.*

E. C. Dailey, for plaintiff in error.

J. L. McPheely, *contra.*

BARNES, C.

On the 5th of July, 1894, the defendant in error filed its petition in the district court for Kearney county against the plaintiff in error to recover a balance due on a promissory note for \$686, given by plaintiff to Finch & Paddock, and by them sold and indorsed to the defendant. The petition was in the usual form. The plaintiff's answer ad-

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mitted the corporate existence of the defendant; admitted that he executed the note in suit and delivered it to Finch & Paddock; admitted that he had paid thereon the several sums set out in the petition, but denied that the defendant purchased the note for a valuable consideration of Finch & Paddock before due; denied that defendant was the owner of the note, and pleaded that the note was a renewal of certain other notes; that the transactions were usurious, and that he had paid Finch & Paddock and the defendant, on account of the same, a sum of money equal to the amount which he received when he executed the original note; denied that he owed the defendant the sum of \$411, a balance on the note in suit, or any other sum of money whatsoever, and prayed judgment for costs. The reply was a general denial. Upon these issues the cause was tried to a jury, and a verdict was rendered for the defendant. Plaintiff prosecuted error to this court and the judgment was reversed on account of an error committed by the trial court in excluding certain evidence offered by the plaintiff. The cause was remanded to the district court and was again tried to a jury; after the introduction of all of the evidence the court instructed the jury in writing and they retired to consider their verdict. After remaining out some time, and being unable thus far to agree, the court caused the jury to be brought into open court and thereupon instructed it to find a verdict for the defendant in error herein, for the amount claimed in its petition, which was accordingly done. The plaintiff in error thereupon filed a motion for a new trial, which was overruled, and he again prosecutes error to this court.

1. The plaintiff does not allege or claim in his petition in error that the court erred in overruling his motion for a new trial, and as the errors complained of occurred upon and during the trial his petition is not sufficient to require us to examine the assignments therein contained, and the judgment of the trial court, for that reason, should be affirmed.

2. The plaintiff's original brief contains no argument

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of any of the assignments of error set forth in his petition; no reasons are given and no authorities are cited in said original brief to substantiate his said assignments. Therefore we would be justified in declining to consider any of them, and on this ground the judgment of the trial court should be affirmed.

3. This case being before us for the second time, we have concluded to examine the record and dispose of the only contention which is available to the plaintiff in error in any view of the case, which is, that the court erred in directing the jury to return a verdict for the defendant.

We have examined the record carefully and read all of the evidence and are satisfied that the verdict returned herein was the only one which could have been rendered by the jury. The evidence introduced by the defendant fully sustained the allegations of the petition, and established beyond question that the note in suit was purchased by it in good faith for a valuable consideration before due, and without notice of any defense thereto. The only evidence introduced by plaintiff on that point was his statement, and that of his wife, that Paddock said in their presence upon one occasion, that he had not sold the note to the defendant; and that it only had the note for collection. This was denied by Paddock. As was held in this case, 59 Neb., 23, this testimony was not admissible as substantive evidence, but only on the question of the credibility of the witness, Paddock. There was plenty of other evidence introduced by the defendant to establish the controverted facts; Paddock's evidence may be wholly disregarded, and still the jury would be compelled to render a verdict for the defendant. There was no error in directing the jury to return the verdict which they did. It would have been reversible error to have refused to do so.

For the foregoing reasons we recommend that the judgment of the district court be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

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GEORGE VRADENBURG, APPELLEE, v. FRANK A. JOHNSON ET AL., APPELLANTS.

FILED JULY 22, 1902. No. 11,846.

Commissioner's opinion. Department No. 3.

1. **Bills and Notes: NOTE IN USUAL FORM: EVIDENCE AS TO PAYMENT BY LABOR: ADMISSIBILITY.** Where a promissory note in the usual form calls for the payment of money, evidence that it was to be paid in work and labor can not be received against the objection of the holder.
2. **Mortgage Foreclosure: EVIDENCE AS TO SUIT AT LAW ON NOTES: SUFFICIENCY.** Evidence examined, and held to make a *prima facie* showing that no suit at law had been commenced on the notes secured by the mortgage in suit.

APPEAL from the district court for Douglas county.
Tried below before FAWCETT, J. *Affirmed.*

J. W. Eller, for appellants.

George A. Magney, contra.

DUFFIE, C.

This is an appeal from a decree foreclosing a mortgage. Two notes were secured by the mortgage, one for \$750 and the other for \$350 and, excepting as to dates, time of maturity and the amount due, are in the following form:

"On or before five years after date I promise to pay to Henry O. Devries or order \$750 for value received, negotiable and payable at the office of the Globe Loan & Trust Company, Omaha, Nebraska, with interest at the rate of 8 per cent. per annum from date until maturity. The interest to be paid semi-annually. All principal and interest not paid when due to bear interest at the rate of 10 per cent. per annum until paid.

"(Signed.)

FRANK A. JOHNSON."

The principal defense offered was the following: "That for a valuable consideration the said Henry O. Devries,

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the payee of the notes described in plaintiff's petition, contracted and agreed with the defendant, Frank A. Johnson, that said notes and interest thereon should be paid in work to be performed by said Frank A. Johnson at customary wages and defendants say that said Frank A. Johnson has always been ready and willing to do and perform work at customary wages in payment of said notes and interest, and that all payments made thereon have been by work performed by said Frank A. Johnson."

The notes by their terms are payable in money and no evidence was properly receivable showing that they were to be paid in any other manner. It is true that the court, over the objection of the plaintiff, received evidence tending to show an agreement between the original parties to the notes that payment should be made in labor, but as the decree went in favor of the plaintiff we must presume that the court rejected this evidence in his consideration of the case.

It is further objected that there was no sufficient proof before the court that no action at law had been commenced on these notes or either of them. On his cross-examination Johnson testified as follows: "No, sir; I will say this: I said I wouldn't do it if I was going to be sued because they threatened to sue me." This remark was made touching an effort to compromise with him and to obtain new notes in place of the old, making a discount of a considerable amount then due. Again, in speaking of certain efforts made by the plaintiff to collect these notes, a witness having them in charge for collection testified that "nothing was done" and "we permitted it to run." We think that the court was justified from the evidence in finding that no suit at law had been commenced upon these notes previous to filing the petition in foreclosure.

We recommend that the judgment of the district court be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

First Nat. Bank of Madison v. Tompkins.

THE FIRST NATIONAL BANK OF MADISON, NEBRASKA, APPELLEE, v. SAMUEL J. TOMPKINS ET AL., APPELLANTS, ET AL.

FILED JULY 22, 1902. No. 11,925.

Commissioner's opinion. Department No. 1.

1. **Creditors' Suit: INSOLVENCY: JURISDICTION: ATTACHMENT AGAINST DEBTOR, JUDGMENT AGAINST HIS EXECUTRIX.** Where a creditor has obtained an attachment lien in debtor's lifetime, and subsequently judgment and order of sale of attached real estate is entered against the debtor's executrix, jurisdiction to clear the title of the attached lands of the debtor's fraudulent deeds, does not depend upon insolvency of the debtor's estate.
2. **Creditors' Suit: MATTERS LITIGATED IN ATTACHMENT SUIT MERGED IN ATTACHMENT JUDGMENT.** As between plaintiff and the debtor's estate all matters litigated in the attachment suit must be deemed merged in the judgment and order of sale of the attached property.
3. **Creditors' Suit: DEEDS FRAUDULENT AS AGAINST ATTACHMENT JUDGMENT.** Evidence examined, and held to sustain trial court's finding that the deeds of the attached property, made by the debtor in his lifetime, were fraudulent as against plaintiff's attachment and judgment.

APPEAL from the district court for Antelope county.
Tried below before CONES, J. *Affirmed.*

J. F. Boyd and S. O. Campbell, for appellants.

W. M. Robertson, W. V. Allen and M. J. Moyer, contra.

HASTINGS, C.

The main question raised in this case is whether or not the evidence supports the conclusion of the trial court that certain deeds made by Joseph Cotey to his brother-in-law, Samuel J. Tompkins, and to his sister-in-law, Lucretia Tompkins, were fraudulent and void as against the appellee's judgment. It is also urged that as it is not alleged that appellee's judgment could not have been collected from Joseph Cotey's estate there is no foundation for

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equitable interference at the suit of the creditors. It is urged that any steps required to vindicate the creditor's rights should have been taken through the debtor's personal representative under sections 211 and 212 of the decedents' act (chapter 23, Compiled Statutes).

The latter question seems to be disposed of by the fact that at the time of Joseph Cotey's death in February, 1897, the appellee's action against him and his wife to recover on the note which is the foundation of this action, was pending, and an attachment had been issued and levied upon the real estate in question here. In the December following the death of Joseph Cotey that action was revived against Mrs. Cotey, his executrix, and judgment in it was rendered and an order entered for sale of the attached property, which is the real estate in question in this action.

It is also alleged that the deeds by means of which this property was conveyed to the defendants, Samuel J. Tompkins and Lucretia Tompkins, were of record and were fraudulent but served to becloud the title to such an extent that the property would not sell for sufficient to bring the amount of plaintiff's claim.

There seems no doubt of the right of one who has a lien by attachment upon real estate to bring an action to enforce that specific lien as against a fraudulent grantee. *Keene v. Sallenbach*, 15 Neb., 203. The right to proceed after the death of the defendant by a revivor of the action against his personal representatives in this instance the executrix, is also secured by section 272, chapter 23, Compiled Statutes. It would seem, therefore, that it was not necessary to allege any insolvency of Joseph Cotey's estate in order to obtain the assistance of equity in enforcing this attachment lien.

It appears that one of the grounds of the attachment was that Joseph Cotey had conveyed away all of his property which was subject to execution, in order to delay and defraud his creditors. So far as Joseph Cotey and his estate were concerned, that question was adjudicated in the attachment suit and it is not necessary for the maintenance

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of this action, as against his representative, that allegations relating to it should be inserted in plaintiff's petition, and if the attachment lien is upheld, it makes a good ground of relief against all parties.

The other question involved is the sufficiency of the evidence to uphold the trial court's finding of fraud. The property consisted of 160 acres of land and two lots in Elgin in Antelope county; the lots were conveyed March 25, 1895, by Cotey and wife to Samuel J. Tompkins, and on the same day the quarter section of land was conveyed to Lucretia Tompkins; both conveyances are alleged to have been without consideration and made in fraud of creditors. It is alleged that at that time Cotey was indebted to the plaintiff bank in the sum of \$1,815.15 for borrowed money; that he was engaged in the general merchandising business at Madison, Nebraska.

It appears that on May 3, 1895, Cotey and his wife executed a mortgage upon certain real estate in Madison, Nebraska, to secure his indebtedness to the plaintiff bank; that this property was subject to some incumbrances under which it was afterward sold. It brought about \$400 above the previous incumbrances, which sum was applied upon the bank's indebtedness, and it is claimed that the transaction by which this security upon the Madison property was obtained was a payment and liquidation of the debt, but evidently this claim can not be so considered in this action. It was presented in the action upon the note, in which the original attachment was issued, and the judgment in the attachment suit must be held to have merged this defense.

It is clear, therefore, that the sole question left is as to the character of the transactions between Cotey and his wife and the defendants, Samuel J. Tompkins and Lucretia Tompkins. As in most cases of this kind the direct evidence comes from the defendants themselves. Samuel J. Tompkins' statement is that on March 23, 1893, he had a settlement with his brother-in-law, Cotey; in which the following statement was made and was accepted by Cotey:

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March 13, 1888.

J. Cotey in % with S. J. Tompkins.

Cash lent J. C.

Settled March 25, 1895.

March 13, '88, Lent J. Cotey on his notes at 10 pr. ct. per annum till paid:

	Amount Principal.	Interest Paid.
Time 7 years, 10 days, \$100.		
Jan. 13, '90, Lent J. Cotey on his note at 10 pr. ct. per annum	\$150 00	\$77 92
Time 5 years, 2 months, 10 days.		
April 5, '90, Lent J. Cotey on his note as above	160 00	79 47
Time 4 years, 11 months, 18 days.		
April 7, '90, Lent J. Cotey on his note as above	30 00	14 47
Time 4 years, 11 months, 17 days.		
April 21, '90, Lent J. Cotey on his note as above	150 00	73 84
Time 4 years, 11 months, 2 days.		
Aug. 8, '91, Lent J. Cotey on his note as above	150 00	54 83
Time 3 years, 7 months, 15 days.		
March 30, '92, Lent J. Cotey on his note as above	170 00	50 46
Time 2 years, 11 months, 23 days.		
Aug. 29, '91, Lent J. Cotey on his note as above	30 00	10 69
Time 3 years, 6 months, 23 days.		
July 25, '92, Lent J. Cotey on his note as above	80 00	22 64
Time 2 years, 9 months, 29 days.		
July 29, '93, Lent J. Cotey on his note as above	90 00	14 80
Time 1 year, 7 months, 26 days.		
July 29, '93, Lent to J. Cotey on his note as above	200 00	33 00
(To pay Tootle, Wheeler and Motter.)		
Time 1 year, 7 months, 24 days.		

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	Amount Principal.	Interest Paid.
March 23, '95, Lent J. Cotey to M. J. Moyer	\$13 50	
	\$1323 50	\$501 95
Int. on amount	501 95	
	\$1825 45	
J. Cotey, Dr. to S. J. Tompkins for labor in his store from Nov. 18, 1887, to March 18, '95 (time 7 years and 4 months), at \$30 per month and board. Amt. of wages my due 3-18, '95....	\$2520 00	
July 24, 1893, Drew \$100 for W. Fair expenses..	100 00	
Leaving a balance	\$2420 00	
In part payment of amounts my due bought Mchds. at 25% Dis., \$2442.91, amt. of purchase..	1832 16	
In further settlement 1 store building and 2 lots situated in Elgin, Neb. Consideration.....	2000 00	
And in further consideration of settlement paid rent building now occupied by J. Cotey. Consideration for one year from this 23d day of March, 1895, to March 23, 1896.....	200 00	
Leaving a balance due me from J. Cotey on settlement of 3-23, 1895.....	213 29	

It will be seen that two matters enter into the consideration for the transfer of this property: loans to the amount of \$1,323.50, with accrued interest of \$501.95, total \$1,825.45; and wages, on which \$100 were paid, leaving a balance of \$2,420. It appears that S. J. Tompkins came to Nebraska in 1887, bringing, as he says, about \$1,200. He had farmed his father's place of 200 acres in Wisconsin for about ten years. Just before coming to Nebraska he had a sale of personal property amounting to about \$600, and seems to have sold some other personal property. He seems to have had about the sum he states. He and his sister made their home with the brother-in-law. He drew about \$75 annually as rent from Wisconsin. It seems entirely probable that he made loans to his embarrassed brother-in-law; it

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might easily have been that the amount is correctly represented by the several items named in the foregoing statement. It seems clear, however, that the item of wages was an afterthought and that on this account there was nothing due, and that it was taken as a convenient pretext for raising the whole claim to an amount sufficient to cover the entire property transferred in the making of this pretended settlement.

The other transaction, which was completed at the same time, was a transfer of the farm in question in Antelope county, valued at that time at from \$1,500 to \$2,500, to the sister, in consideration of an alleged indebtedness of \$1,000 for money loaned and interest on it, being \$650 loaned in April, 1889, and in addition to this there was a charge for wages of \$912 and a note for \$1,000, which is claimed to have since been paid. The sister accounts sufficiently for the possession of the \$650 at the time she claims to have loaned it to her brother-in-law, and the notes are produced. It seems not improbable that this was a genuine loan and actually due, though outlawed at the time of making this deed. With regard to the subsequent \$1,000 note there is no evidence in the record except her own statement corroborated by that of her sister that she has paid it. By what means or out of what funds does not appear. In her case, as in her brother's, it is extremely probably that she had advanced money to her brother-in-law and that it remained unpaid. It is also probable that the \$912 of wages, which enter into this transaction, was an afterthought, and that no wages other than her board and maintenance during the years that she made her home with her brother-in-law were contemplated by the parties until creditors became pressing.

The transactions are very closely linked together and there are many circumstances casting suspicion upon them, one of which is a subsequent transfer of the merchandise to one Stevenson and its immediate shipment by him to Kilkenny, Minn., and its retransfer within a few weeks, perhaps a few days, to Tompkins. Stevenson

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seems never to have been in Kilkenny, Minn., to have had no knowledge of the country and the goods appear to have been shipped there because a son of Joseph Cotey's son was railway station agent at that place. Another circumstance much insisted upon by appellee is the fact that in a replevin action over the goods which seems, however, to have resulted in Tompkin's favor, the latter was entirely unable to state specific dates and amounts of the loans to his brother-in-law. At the subsequent hearing in this case he is positive and specific as to both. At that hearing, too, Lucretia Tompkins claimed wages for services "in the family" on a contract with Mrs. Cotey and said she had none with Joseph Cotey. In this action the services are claimed to have been mostly in the store and on an arrangement with Mr. Cotey.

We are entirely unable to say that the findings entered by the trial court, that defendants' deeds were fraudulent and void as against plaintiff's attachment lien, and that plaintiff is entitled to have them set aside, is unsupported by the evidence.

It is recommended that the decree of the trial court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

THE FIRST NATIONAL BANK OF MADISON, NEBRASKA, APPELLEE, v. SAMUEL J. TOMPKINS ET AL., APPELLANTS, ET AL.

FILED APRIL 22, 1903. No. 11,925.

Commissioner's opinion. Department No. 2.

Appeal and Error: CONSTRUCTION OF PETITION HERE FIRST ASSAILED.

A petition when assailed for the first time in this court will be liberally construed.

REHEARING of case reported *ante*, page 328.

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APPEAL from the district court for Antelope county. Tried below before CONES, J. *Former judgment of affirmance adhered to.*

Samuel J. Tuttle, A. G. Wolfenbarger and S. O. Campbell, for appellants.

Robertson & Wigton, W. V. Allen and M. J. Moyer, contra.

OLDHAM, C.

The former opinion in this case may be found *ante*, page 328, and in 91 N. W. Rep., 551, and as appears from the statement therein contained, this was an action in the nature of a creditors' bill, for the purpose of removing a cloud cast upon the title of certain attached real estate, by an alleged fraudulent conveyance thereof by the judgment debtor. The proposition contained in the first paragraph of the syllabus of the former opinion is not questioned in this application for rehearing, and as we are fully satisfied that it correctly states the law, we will give it no further attention.

We are, however, urged to examine into the sufficiency of the allegations of plaintiff's petition to support the judgment rendered by the district court. The petition, being assailed for the first time in this court, will, under a well established rule, be liberally construed. It sets out the indebtedness of Joseph Cotey, the grantor of the alleged fraudulent conveyances, to plaintiff; the institution of a suit in the district court for Madison county for the recovery of the amount of the debt; the issuance of an order of attachment in aid of such action; the judgment sustaining such attachment; a judgment of revivor of the action against the personal representative of Joseph Cotey; the judgment for the amount due plaintiff, and the order of the court directing the sale of the attached property to satisfy such judgment and costs. It also alleges that on March 25, 1895, Joseph Cotey and his wife con-

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veyed by warranty deed part of the lands in controversy to Samuel J. Tompkins, and the remainder to Lucretia Tompkins, and that both of these conveyances "were made without consideration and for the purpose of hindering, delaying and defrauding the plaintiff and other creditors of said Joseph Cotey"; that after said conveyance, Joseph Cotey was insolvent and had no property left, and has not since then had any property for the payment of plaintiff's claim; "that said Samuel J. Tompkins and Lucretia Tompkins, to whom said premises were deeded, as aforesaid, knew at the time of accepting the deeds thereto that said conveyances were made by said Coteys without consideration and for the purpose and with the intention to hinder, delay and defraud the creditors of said Joseph Cotey, and especially to hinder and delay this plaintiff in the collection of its claim."

We think this petition is amply sufficient to charge the grantees in the deeds with knowledge of and an active participation in the fraudulent intent of the grantor. We are perfectly satisfied with the conclusion reached at the former hearing, that as between the plaintiff and Joseph Cotey the judgment of the district court in the attachment suit, which was never reversed, established the amount of plaintiff's claim against Joseph Cotey and the fraudulent intent of Joseph Cotey in the alienation of the lands in controversy. So that the only question now to be determined is the good faith of the grantees in these deeds in their transactions with Cotey.

At the earnest request of counsel for appellants, we have examined the testimony on this question contained in the bill of exceptions, and after having done so are fully satisfied with the conclusion reached by the learned commissioner at the former hearing.

It is therefore recommended that the former judgment be adhered to.

BARNES and POUND, CC., concur.

FORMER JUDGMENT OF AFFIRMANCE ADHERED TO.

Farmers Mutual Ins. Co. v. Tighe.

**FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA V.
EDWARD TIGHE.**

FILED JULY 22, 1902. No. 11,967.

Commissioner's opinion. Department No. 3.

Insurance: LACK OF EVIDENCE TO SUSTAIN JUDGMENT. The verdict and judgment of the district court being wholly unsupported by the evidence are reversed and a new trial granted.

ERROR from the district court for Cass county. Tried below before **JESSEN, J.** *Reversed.*

E. M. Coffin and *E. J. Clements*, for plaintiff in error.

Matthew Gering, *contra.*

AMES, C.

We can not discover any substantial dispute either of law or of fact in this record. The defendant in error made a written application for, and obtained from the plaintiff in error, an insurance company organized under the laws of this state, a policy of insurance upon his farm buildings against loss or damage by fire, lightning, wind or tornado. The written application, the policy of insurance, and one of the by-laws which was expressly made a part of the contract, each contained the following paragraph: "Open sheds, single corncribs, windmills and hay and grain in stack, will not be insured against wind and tornado." There were verbal differences in the clause as repeated in the several documents, such as, for instance, the omission of the word "wind" before the word "tornado" in the policy, but the three instruments read together leave no room for doubt that the intent of the parties was accurately expressed by the foregoing quotation from the application. No fraud, misrepresentation or mutual mistake is pleaded or proved or attempted to be, except that it is alleged that at the time of making the contract the insured asked the agent if his corncrib and

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cattle shed were insurable, and was answered in the affirmative. The answer was true because the policy did insure them against loss or damage by fire or lightning, and it is not contended that the agent supposed that other insurance was referred to by the inquiry. In view of the language of the written agreement, the contrary inference was the natural one and the one which probably the agent made. A single corncrib and an open shed belonging to the defendant in error and a part of the property insured were destroyed by wind or tornado, and he notified the company by letter of that fact. In response the company through one of its officers requested him to make and forward an estimate of the amount of his loss, which he did, fixing the amount at \$50. In neither of his communications did he describe the exact character of the structures destroyed, and the company first learned that they were a single crib and an open shed and therefore excluded from indemnity afforded by the contract, from an adjuster whom they sent to the defendant in error's premises to ascertain and settle the loss. The company then promptly refused to make payment and this suit was begun. It does not appear that the company or any of its agents made any misrepresentation to the defendant, or said or did anything that can be construed as a recognition of liability on account of the transaction, after learning the true state of affairs, or that misled him to his damage or prejudice in any respect. There is therefore nothing in the record to support the defense of estoppel upon which the defendant in error relies. The verdict and judgment of the district court in favor of the defendant in error are unsupported by evidence and it is recommended that they be reversed and a new trial granted.

DUFFIE and ALBERT, CC., concur.

REVERSED AND REMANDED.

Crane Co. v. Columbus State Bank.

CRANE COMPANY V. THE COLUMBUS STATE BANK.

FILED JULY 22, 1902. No. 11,985.

Commissioner's opinion. Department No. 1.

1. **Principal and Agent: INSTRUCTION: DEFINITION OF AGENT: EXPRESS WORDS OF AGREEMENT TO CONSTITUTE AGENCY.** An instruction that an agent is one "authorized," "empowered" and "directed" by another to transact business which the agent "undertakes" and "agrees" to do, *held* not to require express words of authorization or agreement in order to constitute an agency.
2. **Principal and Agent: INSTRUCTIONS: ADMITTED AGENCY FOR CERTAIN PURPOSE SUFFICIENT FOR ALL.** The giving of such an instruction as to the creation of an agency to collect, *held*, not prejudicial error where the jury were instructed that an admitted agency to present a draft for acceptance was sufficient agency for all purposes of the action.
3. **Principal and Agent: BAD FAITH OF AGENT: EVIDENCE OF MERE NEGLIGENCE IMMATERIAL.** The cause of action being for bad faith on an agent's part in taking an assignment of a lien with notice that the agent's principal claimed an interest in it, evidence tending only to show negligence in collecting is immaterial.
4. **Principal and Agent: EVIDENCE: SUFFICIENCY.** Evidence *held* to sustain verdict.
5. **Evidence: TESTIMONY AT FORMER TRIAL READ FROM RECORD: WEIGHT: INSTRUCTION.** Not error to refuse to tell the jury that statements read from record of former trial were to be given same weight as if made by witness actually present.

ERROR from the district court for Platte county. Tried below before GRIMISON, J. *Affirmed.*

O'Neill & Gilbert and McAllister & Cornelius, for plaintiff in error.

Whitmoyer & Gondring, contra.

HASTINGS, C.

This case is here for the second time. A former trial resulted in a verdict and judgment for plaintiff, which was reversed in this court (*Columbus State Bank v. Crane Company*, 56 Neb., 317), because the trial court by its

instructions included among the possible grounds of recovery on plaintiff's part, a liability by direct agreement of defendant with plaintiff's debtor, Schroeder, that the proceeds of a certain mechanic's lien, assigned by Schroeder to defendant, should in part be applied upon the draft which forms the basis of plaintiff's action. This ground of recovery had been explicitly renounced by plaintiff at the trial, and it was held error to submit it to the jury. That renunciation was renewed at the last trial and is still in effect. The sole ground of recovery was bad faith on defendant's part as agent for the plaintiff in taking the assignment of the mechanic's lien and applying the entire proceeds towards the satisfaction of its own claims against the common debtor, Schroeder. The second trial resulted in a judgment for defendant.

Plaintiff claims there was error in the first place in giving, at defendant's request, its instruction number three as follows:

"You are instructed that an agent is one who is authorized and directed by another to transact or manage some affair or business for him and which the former undertakes and agrees to do for the latter, and in this case the defendant was not the agent of the plaintiff, or Crane Bros. Mfg. Co., for the collection of said order unless you find from the evidence that the defendant was empowered and directed by said Crane Bros. Mfg. Co., before the assignment of the mechanic's lien to the defendant, to collect and obtain the payment of said order for and on behalf of said Crane Bros. Mfg. Co."

It is claimed that this requires an agent to be expressly authorized, empowered and directed to act for the principal. It does not seem to us that any such requirement is fairly implied in the words. It is true that the combination of the three words, "authorize," "empowered" and "directed," on the one side, and the two, "undertakes" and "agrees" on the other, make it look like a somewhat formidable undertaking to create an agency. It is conceded, however, by plaintiff, that any of the words singly,

or even all of them if combined by means of disjunctives, would leave the agency to be established by inference from the facts instead of by express words. If this is true of each of the terms used, it seems to us true of their combination. The facts were submitted and the jury must have understood that the agency, if established at all, must be by the facts, and that from them, if at all, were to be inferred the authorization and direction.

The court, in truth, seems to have instructed the whole question of agency for collection practically out of the case. It told the jury that defendant's agency for the presentation of the \$300 draft drawn by Schroeder on Brandt & Fleming was admitted; it instructed that if the draft was intended as an assignment of that much of Schroeder's lien against Brandt & Fleming's hotel, and the bank knew it, its taking the assignment of the entire lien to secure its own claim against Schroeder was in bad faith, and it should be held to account for the amount of the draft. This is made the issue in this case.

The agency to present being admitted, the liability is claimed because the \$300 draft of Schroeder on Brandt & Fleming, which was accepted by them on the day Schroeder assigned his mechanic's lien for \$944 on their hotel to the defendant bank, is asserted to have been *pro tanto* an assignment to plaintiff of that much of Brandt & Fleming's debt to Schroeder which was secured by that lien. The bank is claimed to have known that it was so intended, and to have acted in bad faith by interposing its own assignment. This was the cause of action set out. The court instructed that the admitted agency to present the \$300 draft to Brandt & Fleming was sufficient to establish defendant's liability, if the other facts, as to the assignment and defendant's knowledge, were shown. Agency to collect under this view was not of importance. If found, it would have added nothing to the effect attributed by the trial court to the agency admitted. It is impossible to see how this instruction, as to the agency to collect, if it be granted that it required too much, was prejudicial.

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It is claimed that the verdict is not supported by the evidence. This claim is argued upon the statement of the bank's president that nothing was done towards collecting the draft. It does not appear, however, that any exertions would have been availing against Brandt & Fleming, and, as against Schroeder, plaintiff seems to have taken judgment the following year with no results. The action was not for negligence in handling the draft for collection, but for bad faith in taking the assignment.

It is not suggested by counsel, but has been at the consideration of the case, that the drawing of the \$300 draft by Schroeder and the delivery of it to plaintiff on October 4, was *ipso facto* an assignment of that much of the mechanic's lien. The lien at that time had no existence. It is dated October 7 and was filed October 11, the same day the draft was accepted. The bank seems to have had a long litigation over this lien but finally to have collected its full amount which, however, did not pay in full the indebtedness which the bank held against Schroeder. The draft on its face made no reference to any particular account and certainly of itself did not serve to assign any portion of a lien not then in existence. The assignment of all of Schroeder's account against Brandt & Fleming would have given the plaintiff no right to go on and perfect the lien. *Goodman v. Pence*, 21 Neb., 459; *Noll v. Kenneally*, 37 Neb., 879. The latter case is authority for the proposition that an assignment of an account by a material man destroys the right to a lien for its security and transfers only the account. The withdrawing of the draft from presentation would indicate that this effect of an assignment of the account was intended to be guarded against.

The cases holding that the giving of a check or draft against a fund expressly held subject to such draft or check, assigns the fund, hardly seem to apply to a mere indebtedness. To constitute this transaction an assignment of Schroeder's account to that extent to plaintiff there must have been an understanding to that effect be-

tween the parties to it and of that there is no proof. In the absence of proof of such an understanding the making and acceptance of the draft would merely constitute a cross-demand. It would not be the case of one who had agreed to honor checks or drafts and held a fund for that purpose.

It is to be said, too, that no exception was taken at the trial to the instruction by the trial court that plaintiff must prove the knowledge on defendant's part alleged in the petition, that there had been a prior assignment to plaintiff. No complaint is made now of such instruction; under it the issue was whether or not the bank acted in good faith and without knowledge of a claim to the lien on plaintiff's part. This was the only matter which the court left in issue. As to this the statements of parties were conflicting. Schroeder testifies to an understanding that the assignment was to secure plaintiff's acceptance as well as some others given by Brandt & Fleming to the bank. The bank officers say they knew nothing as to what fund this draft was drawn against and the record is silent as to any particular fund or understanding to assign. The verdict must be held to be supported by the evidence.

It is complained that the bank's president was allowed to answer the question "Was it (the draft) entered on the register for purpose of collection?" His answer was "No, sir, * * * it was simply to keep track of it." This was objected to as incompetent and calling for a conclusion. The objection does not seem to be well taken. The collection register had been introduced to show an understanding by defendant that it had the draft for collection. It was competent for the defendant to show for what purpose it was entered on the register. As before stated, the whole question as to the agency to collect was immaterial under the court's instruction, as to the effect of the agency to present.

Complaint is also made of the statement of defendant's president as to conversations had with agents of plain-

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tiff. The witness could give no dates and did not remember the names of the agents. The nature and circumstances, however, of the conversations sufficiently indicate that they were, as testified, had with traveling representatives of plaintiff, and the action of the court seems to have been correct in admitting them.

It is also objected that the president was allowed to state that the delay from November 24, when the bank received the draft, until December 9, when it was accepted, was not due to anything the bank did. This was objected to on the ground that he had already said he did not know. He had, in fact, stated that he did not know what took place when it was presented. He might, however, have known what caused the delay in presenting. The objection was rightly overruled. When subsequent examination revealed that the witness, in fact, had no personal knowledge about it, no motion to strike out this statement was made.

Complaint is made because the court refused to instruct that a witness's testimony read from the bill of exceptions was entitled to the same consideration and credit as though the witness was present at the trial. It does not appear that the plaintiff was prejudiced by the refusal to give that instruction.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

BESSIE BLOTCKY V. AQUILLA MILLER.

FILED JULY 22, 1903. No. 12,012.

Commissioner's opinion. Department No. 3.

Pleading: ULTIMATE FACTS NOT EVIDENCE: CONTRACT MADE BY AGENT: ALLEGATION. A pleading should state the ultimate fact alleged to exist, and not the evidence by which that fact may be proved. It is proper therefore to allege in a petition that a contract was entered into by the defendant, although the proof may be that he made the contract through the medium or instrumentality of an agent.

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ERROR from the district court for Douglas county.
Tried below before JESSEN, J. *Affirmed.*

Alex. A. Altschuler, for plaintiff in error.

V. O. Strickler, *contra.*

AMES, C.

One Frank Blotcky hired a horse from the defendant in error, Miller. The horse was injured while in the possession of the former, and this action was brought against the plaintiff in error to recover damages for such injury. The sole contested question of fact in the case was whether Frank hired and used the horse on his own account and in connection with his personal affairs, or whether he did so as the agent of the plaintiff in error, and in the transaction of a part of her affairs as the proprietor of a produce commission business in Omaha. Concerning this question there is a sharp conflict in the evidence and the jury settled the issue in favor of the defendant in error. It is the settled rule that in such cases the question of fact will not be inquired into in this court. But the plaintiff in error complains that the court erred in submitting this question to the jury at all, for the reason that the subject of agency is not mentioned in the pleading and was therefore, as he contends, not embraced within the issues presented for trial. In this respect we think counsel is mistaken. The defendant in error alleged what he deemed to be, and what the jury found to be, the ultimate fact, namely, that the horse was hired from him by Bessie Blotcky. To prove this fact it was competent for him to show, if he could, either that she entered into the contract of hiring personally, or that she entered into it through the medium or instrumentality of an agent. He chose the latter course and succeeded to the satisfaction of the jury. It is not complained that the court did not submit the question fairly to the jury if it was a matter proper for them to inquire

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into. We think there was no error in this respect. The answer was a general denial, but the fact that the horse was wrongfully injured during the term of the hiring, was also decided by the verdict and is not open to investigation here.

It is recommended that the judgment of the district court be affirmed.

ALBERT and DUFFIE, CC., concur.

AFFIRMED.

ELIZA J. LEACH ET AL., EXECUTORS OF THE LAST WILL AND TESTAMENT OF OSCAR LEACH, DECEASED, APPELLANTS,
V. P. L. HARBAUGH, APPELLEE.

FILED JULY 22, 1902. No. 12,030.

Commissioner's opinion. Department No. 1.

1. Injunction: TRESPASS: ACTION FOR DAMAGES AT LAW. In case of a mere trespass unless the threatened harm will be great or the loss therefrom irreparable, and such as can not be recompensed in damages by an action at law, an injunction will not be granted to prevent it. *Tigard v. Moffitt*, 13 Neb., 565, followed.
2. Injunction: TRESPASS: INSOLVENCY: EQUITABLE RELIEF. There being no proof that defendant was insolvent, the facts established do not present a case for equitable relief.

APPEAL from the district court for Antelope county.
Tried below before CONES, J. *Affirmed.*

S. D. Thornton, for appellants.

E. D. Kilbourn, contra.

DAY, C.

The plaintiffs bring this appeal to review a judgment of the district court for Antelope county dissolving a temporary order of injunction and dismissing the plaintiff's action. The petition, among other things, alleges that the defendant, without any right or title, has gone

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upon the plaintiff's land and has cut a large amount of hay and threatens to continue cutting hay upon said premises; that by reason of the wrongful and unlawful acts of the defendant in refusing to allow persons to go upon the land, and by reason of his threats of personal violence to those attempting to go thereon, the plaintiffs have lost the opportunity of leasing the said premises to responsible parties; that the defendant claims to have leased said premises and claims to have some right of possession thereto, but that neither plaintiffs nor any person for them have ever leased or given the said defendant any right to the possession of the said premises or any of the hay thereon; that the defendant is wholly insolvent and that plaintiffs are without any adequate remedy at law.

It appears from the testimony that the defendant had entered upon the land without any authority, and was cutting the grass growing thereon. While thus engaged, one Keimes, who had leased the land from plaintiffs for haying purposes, went upon the premises for the purpose of cutting the grass and was driven therefrom by the threats of the defendant. A few days later the hay which had been cut by defendant on the land was replevied. It also appears that Keimes, a few days later, again attempted to go upon the premises but that he was again intercepted by the defendant and by threats of violence prevented from going upon the premises.

There was no competent testimony tending to show that defendant had any claim to the land. True, it was alleged in the petition that he claimed to have a lease, but this was denied by the answer. The testimony is clear that he was a mere trespasser. It seems very clear that the acts of the defendant were not of such a character as would produce an irreparable injury to the land. The damages sustained by the plaintiffs were easily reducible to a money value and their loss could be compensated by the payment of the rental value of the premises. There is no proof whatever that the defendant was insolvent

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or unable to respond in damages for any judgment which might be rendered against him for his unlawful act. For aught that appears in this record the plaintiffs have an adequate remedy at law, in an action for damages.

This court has recognized the doctrine, that equity will afford a remedy for repeated and continued acts of trespass, when the defendant has threatened to continue the wrongful acts, even though the defendant may not be insolvent. In such cases the relief is granted to prevent a multiplicity of suits. *Shaffer v. Stull*, 32 Neb., 94; *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb., 364. In our opinion, however, the facts of this case do not bring it within the rule of the foregoing cases. In our view the case at bar is governed by the rule announced in *Tigard v. Moffit*, 13 Neb., 565, wherein it is said: "In case of a mere trespass, unless the threatened harm will be great, or the loss therefrom irreparable, and such as can not be recompensed in damages by an action at law, an injunction will not be granted to prevent it." The threatened harm was not an irreparable injury to the land or to the plaintiffs, but was such that it could have been recompensed in damages. There being no proof that defendant was insolvent, the facts proven do not, in our opinion, present a case for equitable relief, and we therefore recommend that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

ELLA M. CANON ET AL. V. FARMERS' BANK OF COOK.

FILED JULY 22, 1902. No. 12,039.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error:** INSTRUCTION INCOMPLETE FOLLOWED BY ONE CORRECT: VERDICT THE ONLY ONE POSSIBLE. A judgment will not be reversed because of the giving of an incomplete instruction where it is followed by one on the same point which is in all respects correct, and where the verdict on that point is the only one warranted by the evidence.

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2. **Appeal and Error: INSTRUCTION CORRECT BUT NOT APPLICABLE.** The giving of an instruction which is correct as an abstract proposition of law although not applicable to the issues, if in no wise prejudicial to the party complaining, is not reversible error. *McClary v. Stull*, 44 Neb., 175.
3. **Fraud: FALSE REPRESENTATIONS: INSTRUCTIONS: SUFFICIENCY.** Instructions Nos. 3 and 4 examined, substance stated, and *held* that they correctly state the law relating to false and fraudulent representations.
4. **Appeal and Error: REFUSAL TO GIVE GROUP OF INSTRUCTIONS: HOW FAR CONSIDERED.** Where error is assigned for the refusal to give a group of instructions consisting of several separate paragraphs, such assignment will only be considered so far as to ascertain that some one of the instructions was erroneous.
5. **Vendor and Purchaser: CAVEAT EMPTOR: REFUSAL TO GIVE INSTRUCTION OF FRAUD: PRESUMPTION OF NEGLIGENCE.** Where negotiations for the sale of certain lots were pending six months, and during that time the purchaser examined them and the situation and conditions surrounding them, and sometime thereafter completed the purchase, the court properly refused to instruct the jury that the fact that the price paid was largely in excess of the actual value of the lots, raised a presumption of fraud in the transaction. At most, these facts would only raise a presumption of negligence or error in judgment on the part of the purchaser.
6. **Trial: SEALED VERDICT: FAILURE TO COMPUTE AMOUNT: JURY PERMITTED TO COMPLETE VERDICT.** Where a jury, under the directions of the court and with the consent of the parties, has returned a sealed verdict, and separated with instructions to return into court at a day to which an adjournment was taken, and upon said adjourned day, it appearing by their verdict when read in their presence that they had failed to compute and insert the amount of the recovery therein, it is proper practice for the court to instruct them to retire, make such computation and complete the verdict by inserting the amount of recovery.
7. **Evidence: OFFER TO PROVE FACT NOT CONNECTED WITH TRANSACTION IN QUESTION.** An offer to prove that defendant's cashier, when he purchased the note in suit, knew of other transactions of the kind in question generally, in Lincoln in the years of 1895 and 1896, and that Woods Bros., of said place, had tried to hire him as a capper, without offering to in any manner connect such proof with the transaction in question, was properly excluded as too remote to be of any assistance to the jury.
8. **Evidence: BILLS AND NOTES: PROOF OF RATE OF DISCOUNT WHERE NOTE IS PURCHASED: OFFER OF PROOF OF RATE AT OTHER PLACES.** When the usual rate of discount is shown at the place where a

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note is purchased, as bearing upon the question of good faith in such purchase, it is proper to exclude evidence offered as to rates of discount in other places, although in the same county.

9. **Trial: IMPEACHING VERDICT BY AFFIDAVITS OF JURORS: FINDING: APPEAL AND ERROR.** Affidavits of jurors should not be received to impeach their own verdict; but where they have been so received and have been opposed by counter affidavits and the issue of fact thus made has been tried by the court, its finding and determination thereon will not be disturbed unless manifestly wrong.
10. **Fraud: PREDICATED ON PROMISE NOT PERFORMED: INSTRUCTION.** Fraud can not be predicated on a promise not performed. To be available there must be a false assertion in regard to some existing matter, which is material, and by which a party is induced to part with his money or property. *Perkins v. Lougee*, 6 Neb., 220. *Held*, That an instruction to that effect was properly given.
11. **Evidence of False Representations: SUFFICIENCY: VERDICT RIGHT: ERRORS DISREGARDED.** Evidence examined, and its substance quoted. *Held*, That it was not sufficient to constitute a defense; that the verdict was clearly right and the only one warranted by the evidence. Therefore the errors, if any intervened during the trial, should be disregarded. *United States School Furniture Co. v. School District*, 56 Neb., 645, 77 N. W. Rep., 62.

ERROR from the district court for Johnson county.
Tried below before LETTON, J. *Affirmed*.

George A. Adams, W. W. Giffin, Sydney S. Stewart
and *Al. N. Dufoe*, for plaintiffs in error.

S. P. Davidson, contra.

BARNES, C.

This action was originally commenced in the county court of Johnson county, where it was tried and a judgment rendered in favor of the plaintiff. An appeal was taken, by the defendants, to the district court, where the issues were again made up, and a trial was had to a jury. The action was based upon a promissory note given by the plaintiffs herein to one George H. Glade, for \$500 with interest at the rate of seven per cent. per annum from date until paid. The note was dated at Tecumseh, Nebraska, January 2, 1896, and was due two

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years after date. The petition in the district court was in the usual form, and alleged that the plaintiff (defendant here), purchased the note before due, and in good faith for a valuable consideration without notice of any defense thereto. To this petition the defendants filed an answer in substance as follows: They admitted the execution and delivery of the note and that Glade, the payee, indorsed the same; that plaintiff was the holder and owner thereof; but denied that the plaintiff purchased the note before maturity in the usual course of business, in good faith, for full value and without knowledge of any defenses thereto. It was further alleged in the answer that the note was given to secure the payment of part of the purchase price of lots seven, eight and nine, in block twenty-seven in Normal Addition to the city of Lincoln; that George H. Glade, the payee of the note, who was then the owner of the lots, fraudulently conspired with one James M. Morton and one Rector, whose name was alleged to be unknown, to procure the defendants' signatures to the note, and cheat and defraud them out of the amount represented thereby, together with certain other property given for the said lots by falsely representing to the defendants the value of the said lots, and that costly improvements were about to be made near said lots, as follows: That block twenty-eight of said Normal Addition was owned by Union College, known as the Advent College; that the trustees and management of said college had arranged for, and had agreed to immediately commence the erection of a costly and imposing structure upon said block twenty-eight, to be used as a sanitarium; and that said block had been procured by said Union College for that specific purpose; that the Lincoln Normal University was, at the time of the sale of said lots, and the giving of said note, wholly free from debt and in a sound financial condition, and in every way prosperous; that said university owned its buildings and campus clear and free of incumbrance, and that said building cost the sum of \$100,000, and together with the campus

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was reasonably worth that sum. That the Hon. W. J. Bryan, late candidate for president of the United States, had agreed to, and was about to, erect near said lots a residence at a cost of not less than \$20,000 to be occupied by himself and family as their home. That those having the management of the street car line to College View, the location of Union College, had agreed to, and soon were going to, connect said lines by building a track north and south to connect the termini of said lines, thus completing a circuit over and around which there would be a great amount of travel for business and pleasure, and which would greatly enhance the value of said lots; that lots in said addition were being rapidly sold at prices equal to and exceeding that asked of defendant, Ella M. Canon, for the said lots; that by reason of the improvements that were contemplated and would be made in said addition, that defendants would double their money if they would purchase said lots at the price agreed upon; that certain other lots had been sold for \$300 each, and that lots for sale in said addition would soon be withdrawn from the market, or the prices asked greatly advanced, and that a park had been laid out and would be constructed near said lots. It was further alleged in the answer that the said representations were false, fraudulent and untrue, and were known to be so at said time by Glade, the payee of the note. It was further alleged that George H. Glade had offered to deed Union College lots in said addition, but that they would not accept the same as a gift for the erection of any structure or building thereon; that the defendants relied upon the said false and fraudulent statements and believed them to be true, and were thereby induced to, and did, execute and deliver said note to George H. Glade; that they thus purchased of said Glade said lots and agreed to pay therefor the sum of \$900; that they turned over and delivered to said Glade horses and mules to the value of the agreed price of \$250, together with a note for \$150 and the note in suit. It was further alleged that James M. Morton

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entered into said fraudulent agreement with said Glade, and did with and for him, make said false statements and representations to the defendants; that Morton was an old neighbor of the defendants, a personal friend of the family, in whom they had the utmost confidence until they discovered the falsity of the said statements heretofore set forth. It was further alleged that Ella M. Canon had no experience in business and trading; that she was raised upon a farm, has always resided in the country, and that she had no knowledge of the value of said lots and property, and in making said purchase she relied upon the statements and judgment of Glade, Rector and Morton, and more particularly on the statements of Morton, whom she had known from childhood until his removal to Lincoln, Nebraska, eight years prior to said transaction; that she was confined to her bed at the time by sickness, and was greatly enfeebled physically and mentally; and that she was incapacitated for the transaction of business of any nature. It was further alleged that the lots were of no value whatever, and as farm land would be worth about \$40 per acre. It is further alleged that Ella M. Canon, one of the defendants, was the principal maker of the note, and that Samuel T. Canon, also one of the defendants, signed the note as surety only. The answer concluded with a prayer, that the defendants "go hence without day, and have a judgment against the plaintiff for costs." To this answer the plaintiff replied by a general denial. Upon these issues the cause was tried, and resulted in a verdict for the plaintiff and against the defendants, for the full amount of the note and interest. Thereupon the defendants filed their motion for a new trial, which was overruled; judgment was entered upon the verdict, and thereafter they filed their petition in error in this court. They will hereafter be called the plaintiffs.

1. It is contended by the plaintiffs that the court erred in giving instruction No. 2, on his own motion. That portion of the instruction complained of is as follows:

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"If you find from the evidence that the note was procured by fraud then the plaintiff would not be entitled to recover a verdict in this case unless you find from the evidence that it bought said note before maturity for value, in the usual course of business and without notice of any defenses against it, and the burden of proof is upon the plaintiff as to this; but if you find the note was so purchased then the plaintiff is entitled to recover a verdict for the full amount of the note and interest, even though you are satisfied the note was procured by fraud."

The contention is that the element of good faith is omitted from this instruction, and such omission was prejudicial error. It may be that this instruction was not so full as it ought to have been, and it might be said to be misleading but for the giving of paragraph No. 14 of the instructions asked for by these plaintiffs, which is as follows:

"An innocent purchaser of negotiable paper, entitled to protection as such, is one who has acquired the paper in good faith, for value, without notice of facts and circumstances of such kind and character that to disregard them would show bad faith, or want of good faith and honesty in the purchase."

It is contended, however, that the error in giving instruction No. 2 is not cured by the giving of another which is entirely correct. We do not think the rule invoked applies in this case. It cannot be said that instruction No. 2 is erroneous. It is good so far as it goes, and at most it is simply incomplete; it is not in conflict with instruction No. 14, or any other instruction given by the court in this case, and when it is read in connection with instruction No. 14, and the other instructions given to the jury, we are unable to say that it in any manner misled the jury to plaintiff's prejudice. Indeed, we may say upon examination of the evidence on the question of good faith, that the jury could not have found any other verdict than the one which they rendered upon this question. Mr. Tober, the cashier of the defendant bank, was

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the only one who gave any testimony relating to the purchase of the note. He said that George H. Glade presented the note to the bank for sale; that he did not know Mr. Glade, and that was the first time he had ever seen him. He says, "I told him that we bought a few notes occasionally, and he presented this note, and I told him that I could not buy the note, because he was a perfect stranger to me; and he wanted to know if I knew Mr. Morton, J. M. Morton; and I told him that I did; and he brought Mr. Morton in there, and they were there probably a half hour, and talked the thing over; they had this plat, or one like it. Well, Mr. Morton did most of the talking; he said that Mr. Glade had some lots; that they were down near the Lincoln Normal, and I understood that Mr. Canon had been to see the property; * * * and I supposed the note was all right, and I bought it at just about the same discount as I would any other note. * * * Mr. Morton said he (Canon) had been up there to see Woods Bros.' lots, and he did not like them, and he went up and saw Mr. Glade's lots and purchased those three. * * * I don't think they mentioned the value of the lots at all; they made several remarks about the boulevard running out there, and mentioned Mr. McFarland's name and several others. I think they said Mr. McFarland owned some land near there. I was not acquainted with this man Glade. I knew Mr. Morton, and had known him some time. His reputation in my community was good so far as I knew; he was considered a reliable man. I had known him probably six or eight years. * * * At the time I purchased the note Mr. Morton's reputation as a business man, and as a man of honor and reliability, was good so far as I knew. At the time I purchased the note I knew of no defense against it." These statements were uncontradicted. We are unable to see, in the light of this evidence, how the giving of the instruction complained of could in any manner prejudice the rights of the plaintiffs herein. That being the case the judgment should not be reversed. *Flower*

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v. Nichols Bros., 55 Neb., 314, 75 N. W. Rep., 864; *Van Housen v. Broehl*, 59 Neb., 48, 80 N. W. Rep., 260.

"A judgment will not be reversed for error committed in the giving of an instruction when the verdict is the only one that should have been returned under the evidence." *Western Union Telegraph Co. v. Lowrey*, 32 Neb., 732, 49 N. W. Rep., 707; *State v. Hill*, 47 Neb., at page 518, 66 N. W. Rep., 541; *Storz v. Finklestein*, 50 Neb., at page 185, 69 N. W. Rep., 856; *Maul v. Dræxel*, 55 Neb., 446, 76 N. W. Rep., 163.

2. Plaintiffs complain of the giving of instruction No. 7, on the court's own motion. This instruction was in substance that where one of two innocent parties must suffer from the act or conduct of another, he who has enabled such third person to occasion the loss must be the person to suffer thereby. It is conceded by the plaintiffs that this instruction announces a correct principle of law; but it is contended that it has no application to the case at bar, and the giving of it was reversible error. Conceding it to be a fact that the instruction was not applicable to the issues involved in the case, it does not follow that the giving of it was reversible error. "The charge of the court should be confined to questions in issue, although a judgment will not be reversed on account of an instruction directed to a matter foreign to the issues which merely imposes upon the successful party an additional and unnecessary burden, and is in no wise prejudicial to the party complaining." *McClary v. Stull*, 44 Neb., 175, 62 N. W. Rep., 501; *Allen v. Saunders*, 6 Neb., 436; *Meredith v. Kennard*, 1 Neb., 312; *Philleo v. McDonald*, 27 Neb., 142, 42 N. W. Rep., 907; *Harrison v. Baker*, 15 Neb., 43, 14 N. W. Rep., 541. The judgment will not be reversed because the court gave this instruction.

3. Plaintiffs insist that the court erred in giving instructions Nos. 2 and 4, separately and severally asked for by the defendant bank. Instruction No. 2 tells the jury in substance that a false representation, in order to be

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a defense in a case like this, must be the representation of an existing fact at the time the representation was made, and not simply a promise or statement that some particular improvements on, or in the vicinity of, the lots in question would be made sometime in the future; that if the false representations relied on consist of statements or representations that certain improvements were going to be made at sometime in the future, on or near the lots in controversy that would enhance the value of said lots, then the jury were instructed that such representations were not sufficient to constitute a defense. Instruction No. 4 stated that the mere expression of an opinion as to the value of the lots sought to be sold, and assurances that certain improvements were going to be made near or in the vicinity of the lots within a short time in the future, were not such false representations or fraudulent representations as to amount to a defense sufficient to defeat a recovery by the plaintiff of the amount due on the note sued on. We hold that these instructions, so far as they go, fairly state the law in relation to false and fraudulent representations. In order to render it actionable fraud in any case, the following essential elements should be present: "(1) The misrepresentation must be of a matter of fact, and not of law; (2) it must be of a fact as distinguished from a mere expression of opinion; (3) it must be of a fact at the time, or previously, existing, and not a mere promise for the future; (4) it must be of a material matter; (5) it must be relied upon by the person to whom it is made, or whose action it is intended to influence." 8 Am. & Eng. Ency. Law (1st ed.), 636, 637. We are not without authority upon this proposition in our own state. See *Moore v. Scott*, 47 Neb., at page 350; *Foley v. Holtry*, 43 Neb., 133; *Crosby v. Ritchey*, 47 Neb., 924, 927; *American Building & Loan Association v. Bear*, 48 Neb., 455, 457; *Perkins v. Lougee*, 6 Neb., 220, *Esterly Harvesting Machine Co. v. Berg*, 52 Neb., 147; *Cohn v. Broadhead*, 51 Neb., 834. The case of *Perkins v. Lougee*, *supra*, was one where the plaintiff sold to the defendant lot 20 in Perkins & Har-

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ford's second addition to the town of Kearney Junction, for the sum of \$300; \$100 of which were paid at the time of entering into the contract for the sale of the lot; \$100 with interest were to be paid in one year, and \$100 with interest were to be paid two years from date. The defendant afterwards paid thereon the sum of \$25; the action was for the unpaid purchase money. The defendant answered: "That immediately prior to the execution and delivery of the said contract the said plaintiffs, to induce the said defendant to purchase said lot, did then falsely and fraudulently, and with the intent to cheat and defraud the defendant, represent to him that said lot was of great value, to wit, of the value of \$300, by reason of being situate in the immediate vicinity, to wit, within eighty feet of the southeast corner of lots 11, 12, 13 and 14, upon which lots the said plaintiffs falsely and fraudulently represented to defendant that they were about to erect a large brick hotel of the value of several thousand dollars. That plaintiffs, for the purpose of inducing the defendant to purchase said lot at a price far exceeding its true value, and for the purpose of cheating and defrauding the defendant out of the difference between the true value of said lot and the price mentioned in said contract, to wit, out of the sum of \$270, did then falsely and fraudulently state to said defendant, well knowing the same to be false at the time of said statement, and having no intention to carry out the promise then made, stated that in a few days they would commence the erection of said hotel." It appeared in that case, as in the case at bar, that the defendant went upon and examined the lot in controversy before purchasing; a verdict was returned for the defendant, and the plaintiffs prosecuted error to this court. We find in the opinion the following: "Can fraud be predicated on a promise not performed for the purpose of avoiding a written instrument, or a bargain of any kind? I think not. To be available there must be a false assertion as to some existing matter by which the victim is induced to part with his money or property. If it is said that there was no inten-

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tion on the part of the plaintiffs to perform on their part by the erection of the hotel, and that the defendant was induced to purchase the lot in question by the promise of the plaintiffs to erect a hotel, it may be answered that the defendant was content to take the plaintiffs' promise, and fraud can not be based on a failure to perform the same. In morals the failure to perform such a promise may be without excuse or justification, but in law false representations to authorize a rescission must be made in regard to existing facts. *Ranney v. People*, 22 N. Y., 417; *State v. MaGee*, 11 Ind., 154; *Ex parte Fisher v. New York Common Pleas*, 18 Wend. [N. Y.], 608; *Long v. Woodman*, 58 Me., 49; *Grove v. Hodges*, 55 Pa. St., 504. The answer, therefore, does not state facts sufficient to constitute a defense. The judgment is reversed, and the cause remanded for a new trial." We approve the rule thus announced, and hold that it applies to this case, and that there was no error in giving the instruction complained of.

4. The fourth assignment of error is not sufficient to merit our consideration, because it assigns error in refusing to give instructions Nos. 3, 4, 5, 6 and 7, collectively, or in a body. The rule is well settled that assignments of this kind are too general to require our consideration, and we therefore decline to pass upon this question except so far as to determine that some of the instructions so tendered in such group were erroneous. *City of South Omaha v. Powell*, 50 Neb., 798, 70 N. W. Rep., 391.

5. It is contended that the court erred in refusing to give instruction No. 8, requested by the defendants in the court below. It is argued that the instruction should have been given because the evidence shows that the price agreed to be paid for the lots was largely in excess of their real value. In view of the evidence in this case we think the instruction was properly refused. It is true that the price agreed to be paid for a thing, in certain instances, may be so grossly in excess of its real value as to raise the presumption of fraud; but in this case the evidence discloses that Samuel T. Canon, acting for himself and his wife,

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took the time and opportunity to examine the lots in question; he investigated the situation and had every opportunity to ascertain their value. The evidence discloses, without conflict, that he went to Lincoln some three months after Glade first proposed to sell the lots in question to the plaintiffs, and made a full examination of them, together with the surrounding situation, and we think if the lots are of much less value than the amount paid for them it discloses a case of error in judgment on the part of the plaintiffs, in place of raising a presumption of fraud. We hold that the court did not err in refusing to give this instruction.

6. It is contended that the court erred in giving the instruction of April 3, 1900, at the time the jury returned their sealed verdict. It appears from the record in this case that when they retired to consider of their verdict on the 28th of March, 1900, it was agreed by the parties that a sealed verdict might be returned by them and delivered to the clerk, after which they were to separate and return into court when it reconvened. This they did, and afterwards, on April 3, the court having then reconvened and the jury being all present, the sealed verdict theretofore delivered by them to the clerk was opened in their presence, and it was found that they had determined the issues in favor of the plaintiff in the court below, but had failed to insert therein the amount of its recovery. Thereupon, the presiding judge, he not being the one before whom the cause was tried, gave the following instruction:

"Gentlemen of the jury, heretofore I have had nothing to do with this case, and I know nothing of the merits of it, but I find in instruction No. 6, given by Judge Letton, who presided at the trial of this case, and the last paragraph of that instruction reads as follows: 'If you find for the plaintiff it is entitled to the full face value of the note and interest.' Under this paragraph of the instructions it becomes your duty to ascertain the amount due on the note at this time, including interest. You will therefore be given another blank verdict so that you may fill in the

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amount; as you have found for the plaintiff it becomes necessary to find the amount due the plaintiff and insert it in your verdict. This you will do at your earliest convenience, and return a verdict accordingly."

And afterwards, on the same day, the jury returned into court with a verdict for the plaintiff, regular in form, assessing its recovery at the sum of \$646.09. No authorities are cited by the plaintiffs in support of this assignment of error, and we therefore hold that the court did not err in so instructing the jury; that it was the only thing that the court could do in order to prevent a mistrial of the case. It is not shown that the action of the court resulted in any prejudice whatever to the plaintiffs in error, and the judgment will not be reversed on account of this assignment.

7. It is contended that the court erred in sustaining the objection to offer to prove by Mr. Morton that Mr. Tober, the defendant's cashier, knew about transactions of this kind generally in Lincoln in the year 1895 and 1896, and that Woods Bros., had tried to hire Tober as a capper. No reasons are urged and no authorities are cited in support of this assignment. No offer was made to show that such matters had any connection with the transaction involved in this suit. This evidence was entirely too remote to be of any assistance to the jury in determining the questions involved on the trial, and was therefore properly excluded.

8. Plaintiffs allege that the court erred in refusing to permit them to show the usual rate of discount at the banks of Johnson county. The record shows that they were permitted to show the usual rate of discounts at the banks in Cook, the place where the note in suit was purchased. We hold that it was not material what the rate of discount was at other places in Johnson county, and this is especially true because the only question is, whether the sum paid was so disproportionate to the amount of the note itself, as to raise the presumption that there was want of good faith on the part of Tober when he pur-

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chased it. This matter could be determined simply by a comparison of the amount due upon the note with the amount paid for it in connection with the rates of discount at Cook, where the transaction took place. Therefore, the testimony offered was rightly excluded.

9. Plaintiffs contend that the court erred in refusing to grant a new trial on account of the misconduct of a member of the jury. The record contains several affidavits made by the jurors with the evident intention of showing misconduct on the part of one of their number, to wit, Charles R. Lehrack. Giving the evidence the full weight which it is entitled to receive, it amounts to no more than an insinuation against the good faith of the juror. These affidavits were opposed by a large number of counter affidavits, so that the matter was left upon conflicting evidence to the district court to determine whether or not there had been any misconduct on the part of the juror. The court found that there had been no misconduct on his part, and this finding will not be disturbed in this court. It possesses the same force and effect as the finding of the trial court upon any other question of fact, and before it will be set aside it must be shown by the person complaining that the finding of the district court was clearly wrong. It may be observed in passing that affidavits of jurors to impeach their verdict ought not to be received, and courts of last resort should always discourage proceedings of this kind. It would establish a dangerous precedent to permit the verdict of a jury to be overturned whenever one or more of the panel could be persuaded to make an affidavit which would tend to show that some improper action might have taken place during the time of their deliberation. "In the United States, there has been some conflict of judicial opinion upon the question, especially in the earlier cases, but the practice appears now to be generally settled to reject the testimony of the jurors when offered to impeach their verdict." 28 Am. & Eng. Ency. Law [1st ed.], 274; *Harrison v. Rowan*, 4 Wash. C. C., 32; *Wilson v. Berryman*, 5 Cal., 44;

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Forester v. Guard, 1 Ill., 74; *Butt v. Tuthill*, 10 Ia., 585; *Woodward v. Leavitt*, 107 Mass., 453; *Hulet v. Barnett*, 10 Ohio, 459. In *Harrison v. Rowan*, *supra*, it was said: "It would be a most pernicious practice, and its consequences dangerous to this much valued mode of trial, to permit a verdict, openly and solemnly declared in court, to be subverted by going behind it and inquiring into the secrets of the jury room, to find out from some of the members of that body, what was the process by which they or others had come to the result declared by their verdict."

10. Plaintiffs complain of the court for giving No. 5 of its instructions, and allege that it is unfair, and does not state the law. It is insisted that the representations of a fact in the future, and not a mere promise, which has been acted upon and turns out to be false, will entitle the injured parties to the same remedies as fraudulent representations of an existing fact. In support of this contention plaintiffs cite *Abbott v. Abbott*, 18 Neb., 503. In that case the plaintiff had commenced an action to recover damages against the defendant for colluding, conspiring and confederating together against the plaintiff to alienate and estrange from her her husband, to deprive her of the society of her husband and to cause her to lose her home and bring her good name into disrepute, etc. In order to induce her to dismiss her action defendants promised to convey to her a house and lot worth at least \$1,000; that her husband, the father of her child, and son of the defendant, should live with her again; that the defendant would furnish her money as she needed it. Her husband did live with her thereafter for a time when he went away and always remained away thereafter. Defendants wholly failed to carry out their agreement and promise by which they induced her to dismiss her action. It was held that where a party, through misrepresentation and fraud, had gained an advantage in an action, a court of equity, in a proper case, would grant appropriate relief, even if the advantage was obtained by fraudulent promises

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in the nature of an assertion of facts which there was no intention to perform. The case was distinguished in the opinion from *Perkins v. Lougee, supra*, and it was held that the court erred in overruling the plaintiff's motion to reinstate her case. It will thus be seen that the authority cited has no application to the facts in the case at bar. In fact our holding upon the third assignment of error effectually disposes of this question.

11. We have carefully examined the evidence contained in this record, and so far as it is material it is in substance as follows: Mrs. Canon testified that some time in July Glade came to their house and wanted to sell them the lots in question; that he "came into the room and talked about the property at Lincoln, and said it was a good thing, and he wanted us to invest in it. He said there was a sanitarium going up, Advents—had donated the Advents a lot for a sanitarium, and it was going up this summer; they were at work at it then, hauling stone for the foundation; he spoke about a street car line going to go through; he spoke about W. J. Bryan going to build a \$20,000 residence; he spoke about the school being out of debt. He thought it would be a good investment for us; he thought in less than two years it would double; that lots around there were selling for \$300; that was the substance of it, I guess that was about all." She further testified that she never went out there for the purpose of looking at the lots, but that her husband, Samuel T. Canon, did go up there some two months afterwards for that purpose. On cross-examination she testified as follows:

Q. Was your husband up there before the note was given?

A. Yes, sir.

Q. How long was it before the note was given that your husband was up there?

A. I don't know. It seems to me like it was in the fall.

Q. He went up there for the purpose of examining those lots, didn't he?

A. Yes, sir.

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Q. He went up there to look at them?

A. Yes, sir.

Q. How long a time was it that you and your husband and those other parties were talking about your buying those lots before you finally bought them?

A. I could not say.

* * * * *

Q. Well, during the time you were talking back and forth your husband went to see the lots?

A. Yes, sir.

Q. And he went up to see them before you made the note?

A. Yes, sir.

* * * * *

Q. Well, did you get a deed?

A. Yes, sir.

Q. You got a deed to these lots, and you still own the lots?

A. Yes, sir.

Q. Have you been up to see the lots since you purchased them?

A. No, sir.

Mr. Canon's testimony is in substance as follows:

"Mr. Morton came to my place, I think in July, 1895, and we had a little conversation in regard to the lots. He said they had some lots up there to sell at Lincoln; he was working now for Mr. Glade, and Mr. Glade was all right, and he would like for me to go up and see them, and I promised him the first time I got a chance I would go up and look at them."

Q. Did you go up and look at them?

A. Yes, sir.

Q. About when?

A. I think it was along about the last of September.

Q. Did your wife go with you?

A. No, sir.

Q. Did she ever go to your knowledge?

A. No, sir.

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Q. Did you look at them?

A. Yes, sir.

Q. Who went with you out there, anybody?

A. A man by the name of Mr. Lantry, Mr. Glade, Mr. Morton, and I guess Mr. Wilbur Morton was out.

Q. Now, what was said about the lots, if anything, about the matter in progress between you as to the proposition to sell you some of those lots?

A. Why they said they had donated block 28 to the Advent people, and they had agreed to build a sanitarium on that block; they said they had donated a park and set out some trees over south, and was going to have a park there; that the street car was going to run through there. They said the school was out of debt, and that the building had cost about \$100,000 and the property and everything was out of debt, and in a flourishing condition.

Q. Now in what direction was the place where they said they had laid out the park, if you know, from the lots you purchased?

A. It was further down, south.

Q. Do you know or did you know by seeing it, or having it pointed out to you what was Normal Boulevard?

A. Yes, sir.

Q. A street by that name?

A. Yes, sir.

Witness further stated that he signed on those grounds; that the statements made to him were true, that he had no reason to believe but what they were true at the time; that Mr. Morton was an old friend of his. He also testified that he had been there since the purchase of the lots and that no sanitarium had been built there, that no preparations were made to build the sanitarium, and that none of the other houses had been built, or started to be built. He also testified that he had investigated and found that the college building was not clear of incumbrance. He further testified that the college, when he was there was in session, and that so far as he knew it had been kept running in a successful manner until the building was de-

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stroyed by an accidental fire; that he was there about a week before the buildings burned down; that the school was running up to that time, so far as he knew. That he went up to look at the lots before he purchased them, sometime in September, long in the fall; and that at that time he stated that he would not purchase then but would go back and talk with his wife about it. The evidence shows that Glade and Morton called at Canon's house on the 2d of January, and at this time the lots were purchased and the note in suit was given. According to Mr. Canon's testimony the following conversation took place, while he was examining the lots in question, between himself, Mr. Glade and Mr. Morton: They represented that they had donated block 28 for a sanitarium, and the "Advents" had agreed to build a sanitarium, and that this other man had agreed to build a building there, this lawyer I think was the man that was going to build, and then Mr. Bryan.

Q. You don't remember the lawyer's name?

A. No, sir.

Q. Did they tell you how far away Mr. Bryan was going to build?

A. No, sir.

Q. Did not point out the particular place?

A. He did not, but some place between there and town.

Q. Then Mr. Bryan's residence was not to be on the Lincoln Normal Addition proper?

A. Not right on, it was right close to it.

Q. It was on the road to town, and this man's residence was to be on the road to town, wasn't it?

A. It was on the block.

Q. Well, how far from block 27 did they say that the building was going to be?

A. They did not say just where it was, down west from block 28, down there.

Q. They never told you just where it was going to be?

A. No, sir.

Q. Well, what else was said?

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A. They said there was going to be a park, and some of the trees were set out.

Q. Well, you saw where the block was to be laid out into a park?

A. You could see from the ground.

Q. Well, were there any trees set out?

A. It was laid over next to the draw, there were some trees down along the draw.

Q. Then there were some trees there?

A. Yes, the forty acres would come down next to the draw where the trees were.

Q. And you could see that there were some trees set out on this block?

A. I know there were some trees along the draw.

Q. You did not go down there to see?

A. No, sir.

Q. Well what further was said, or was that about all?

A. They represented to me that the school was out of debt.

Q. What school was that, the Lincoln Normal?

A. Yes, sir.

Q. Well, you could see that the school was in an apparently good condition?

A. I could see that it was running.

Q. It was running up to the time the building was burned?

A. Why, I suppose it was, I do not know exactly, other than it was burned down.

Q. Do you know how many students were there?

A. No, sir.

Q. Did you ask anybody how many students were there?

A. No, sir.

Q. Nobody told you how many?

A. No, sir.

Witness further testified that the school building was a nice building, and guessed that was about all they said. He says he told them he would not buy then, but would talk with his wife about it.

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It further appeared in evidence that the plaintiffs herein paid the other note, and all the purchase price of the lots, except the note in question in this suit. It will be observed that the evidence does not sustain the allegations of the answer; that the only existing fact about which any representation was made whatever was the statement that the Lincoln Normal school was out of debt; and that it owned its buildings and campus free and clear of incumbrance. All of the other representations and statements related to matters and things that were expected to happen in the future, and to proposed future improvements. Such representations, as we have heretofore seen, do not constitute actionable fraud, therefore they are no defense to the note in suit. False representations of an existing fact must be as to some material fact. It would take a person of great mental perspicacity to discover what effect the fact as to whether or not the Lincoln Normal school was out of debt could have upon, or how it could be material to, the questions involved in this case. Evidently by that statement it was intended to convey the impression that the Lincoln Normal school would be conducted thereafter and continuously in a successful manner. The evidence discloses that it was so conducted until it was destroyed by the accident of fire. So far as we know if that accident had not happened it might have been successfully and profitably conducted for an indefinite number of years, although it was not free from debt, and there was an incumbrance upon its property at the time the lots in question were purchased. It is apparent to us that no other verdict could have been rendered in this case than the one which was rendered in favor of the defendant herein. Any other verdict based upon the pleadings and testimony would, and should, have been set aside by the court. This being the case none of the matters contended for by the plaintiffs constitute reversible error. *United States School Furniture Co. v. School District*, 56 Neb., 645, 77 N. W. Rep., 62.

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For the foregoing reasons we recommend that the judgment of the district court be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

TALLMADGE KYNER ET AL. V. JOSEPH A. LAUBNER, AS THE
NEXT FRIEND OF HOWARD K. ARNOLD, A MINOR.

FILED JULY 22, 1902. No. 12,047.

Commissioner's opinion. Department No. 1.

1. **Parties: REAL PARTY IN INTEREST UNDER STATUTE: FORMAL DEFECT IN PLEADING: GENERAL DENIAL.** Under section 29 of the Code of Civil Procedure, every action is required to be prosecuted in the name of the real party in interest, with certain exceptions. But where, in an action by a minor prosecuted on his behalf by his next friend, there is a wrong collocation of the names, and it is apparent and obvious from the petition who the real party in interest is, the defect will be held to be formal merely, and can not be raised by a general denial.
2. **Malicious Prosecution: EXCLUSION OF EVIDENCE TO SUSTAIN DEFENSE OF ASSAULT.** In an action for malicious prosecution, defendants alleged that plaintiff had been guilty of an assault with intent to kill, and on the trial sought to show by various witnesses that the condition of the person assaulted was serious and calculated to arouse apprehensions that he would die. Evidence introduced and received prior thereto amply showed that the plaintiff had acted in self defense. *Held*, That the exclusion of the proffered testimony was not prejudicial error.
3. **Arrest: INSTRUCTION AS TO WHEN PRIVATE PERSON MAY: LIMITED.** An instruction purporting to give to the jury the instances in which a private person may make an arrest without a warrant is not objectionable because it is confined to the ground upon which the defendant sought to justify.
4. **Arrest: WHEN PRIVATE PERSON MAY, UNDER STATUTE.** Under the provisions of section 284 of the Criminal Code, a private person may make an arrest without a warrant only in case the offense, for which the person suspected is arrested, has in fact been committed.
5. **New Trial: MOTION FOR, INDIVISIBLE.** A motion for a new trial is indivisible, and where it can not be allowed as to all, it must be overruled as to all.
6. **Arrest: INSTRUCTIONS: SUFFICIENCY.** Instructions set out in the opinion, examined, and *held* not erroneously given.

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ERROR from the district court for Keith county. Tried below before GRIMES, J. *Affirmed.*

John H. Bower and *B. F. Hastings*, for plaintiffs in error.

H. E. Goodall, *contra.*

KIRKPATRICK, C.

This is an action brought by Howard K. Arnold, by his next friend, against James H. Kyner, Tallmadge Kyner, Gordon Kyner and Hettie Kyner, in the district court for Keith county, upon two causes of action set out in the petition, one for false imprisonment and the other for malicious prosecution. Issues were joined by separate answers filed by plaintiffs in error. Trial was had which resulted in a verdict in favor of defendant in error and against James H. Kyner, Tallmadge Kyner and Gordon Kyner, and in favor of defendant, Hettie Kyner. A new trial was granted as to James H. Kyner, and judgment entered on the verdict against Tallmadge and Gordon Kyner for \$100. From this judgment error is prosecuted to this court by the Kyners. Numerous errors are assigned in the proceedings of the trial court by plaintiffs in error, Kyner, which will be summarized and considered as follows: (1) that suit was not brought in the name of the real party in interest; (2) that the court erred in its rulings on the admission of the evidence, and that the evidence is not sufficient to sustain the verdict; (3) that the court erred in giving certain instructions, and in refusing to give certain other instructions requested by plaintiffs in error. No brief is filed by defendant in error.

The first ground of complaint is that the action was instituted in the name of Joseph A. Laubner, as next friend of Howard K. Arnold, and that Laubner was designated in the petition as plaintiff, rather than as next friend of plaintiff. The title of the case is as follows: "Joseph A. Laubner, as next friend of Howard K. Arnold, minor, v. James H. Kyner," etc. The first paragraph of the peti-

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tion is in part as follows: "The plaintiff complains of the defendants, and for cause of action alleges and says, that Howard K. Arnold is a minor under twenty-one years of age, and that he brings this suit as his next friend." This contention of plaintiffs in error seems to be without merit. It is probably true that the petition should set out the name of the minor, and state that the action is brought by his next friend, naming him. But in the case at bar it sufficiently and very clearly appears throughout the petition who the real party in interest is, and the defect complained of seems to be one merely of form. The matter of a defect in the pleading is not raised, unless it may be said to be presented by a general denial. While the petition is not in good form, we are of opinion that the objection, being formal and dilatory in its nature, and not having been presented to the trial court by motion or demurrer, has been waived.

The next contention is that the court erred in its rulings on the admissibility of evidence. The complaint is addressed chiefly to the admission in evidence of oral testimony of the county judge that the prosecution before him against Howard K. Arnold had ended. The record discloses that the docket of the county judge failed to show a judgment dismissing the case of the state against Arnold, defendant in error, herein, and his discharge from arrest; and the county judge was permitted to testify over objections by plaintiffs in error that he had discharged Arnold and dismissed the action against him. The correctness of this action on the part of the trial court need not be inquired into herein, for the reason that Tallmadge Kyner in his answer pleads, among other things, as follows: "Defendant admits that the said county judge upon the said complaint issued a warrant for the arrest of said Howard K. Arnold, and that the said Howard K. Arnold was arrested thereunder, and that he was confined in the jail of Keith county for safe keeping until the preliminary examination, and that upon the conclusion of the preliminary examination the said Howard K. Arnold was dis-

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charged." A joint motion for a new trial was filed, and also a joint petition in error by plaintiffs in error, so that, under the well settled rule of this court, the judgment of the trial court will not be reversed except upon error prejudicial alike to all the parties uniting in the motion for a new trial. There can be no doubt that the effect of that portion of the answer of Tallmadge Kyner is to admit the discharge of defendant in error from arrest and the termination of the prosecution instituted against him. The testimony which was received from the county judge was unnecessary and immaterial under the issues joined, and its admission, therefore, can not be held to have been prejudicial.

There is also complaint with reference to the admission by the trial court of certain other evidence. The questions, to which objections were sustained by the trial court, together with the rulings thereon, are as follows:

Q. Where is that knife now?

A. I can not tell you where it is right now.

Q. You own it but you do not know where it is?

A. I have not got it now.

Q. When did you last see that knife?

Objected to as incompetent, immaterial, irrelevant.
Sustained. Exception.

On direct examination of the physician who attended the man wounded by Arnold, the following questions were asked:

Q. You take it that wound was made by a direct stab with a knife?

Objected to as leading. Sustained. Exception.

Q. State to the jury what in your opinion would have been the effect had not that knife struck a rib, and it had missed the rib, if the blow had not been stopped by the rib, what would have been the effect?

Objected to as incompetent, immaterial, irrelevant.
Sustained. Exception.

Q. I will ask you if a knife struck in that locality, and did not strike a rib, it would have reached the heart?

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Objected to as incompetent, immaterial, irrelevant, leading. Sustained. Exception.

* * * * *

Q. What in your opinion from the condition of Barney Sullivan at that time, what would you think as to the amount of blood he had lost from that wound?

Objected to as incompetent, immaterial, irrelevant. Sustained. Exception.

* * * * *

Q. How about his voice at that time? Was he able to talk readily?

Objected to as incompetent, immaterial, irrelevant. Sustained. Exception.

Q. Did his low condition affect his speaking and breathing? If so, describe how?

Objected to as incompetent, immaterial, irrelevant. Sustained. Exception.

The rejection of this testimony is urged as error. It seems to have been proffered on the part of plaintiffs in error upon the theory that the serious condition of Sullivan after the wound had been inflicted upon his person tended to show that in the mind of Tallmadge Kyner, who made the complaint against Arnold, there was probable cause for believing that a felony had been committed, and thus justified the detention of Arnold by the Kyners until an officer could arrive with a warrant, and further justified his subsequent prosecution upon the charge of assault with intent to kill. We can not adopt the view that the rejection of this testimony was error prejudicial to plaintiffs in error. Whether or not the condition of Sullivan subsequent to receiving the wound justified the detention of Arnold by the Kyners would depend upon antecedent circumstances. If, for instance, Arnold had struck Sullivan in self-defense, he would have been acting lawfully in doing so, and his detention by the Kyners afterwards, and their subsequent prosecution of him, would have been unjustifiable. The evidence received on the trial prior to the proffer of the above testimony was, we think, amply suffi-

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cient to show that Arnold acted in self-defense. It appears that Tallmadge Kyner had told Sullivan that Arnold had used violent and opprobrious language in his, Kyner's, presence, towards Sullivan. The latter went to Arnold and asked him about it, Arnold denying that he had used the language. Sullivan thereupon went and got Kyner, and the two together assaulted Arnold, striking him with their fists, and Kyner then procured a shovel, and handing it to Sullivan, told him "to kill the — — — — —," meaning Arnold. Arnold retreated, trying to get away, defending himself as best he could, and then struck Sullivan with the knife, inflicting the wound. This being the condition of the record, it is not easy to see how the exclusion of the testimony with reference to the extent of Sullivan's wounds could have been prejudicial to plaintiff in error, Tallmadge Kyner, and, as we have seen, unless the ruling is erroneous as to him, it is not to the other plaintiffs in error, all having joined in a motion for a new trial and in a petition in error.

Instructions Nos. 6 and 8, given by the court upon its own motion, are the only ones to which exceptions were taken by plaintiffs in error. The only objection urged to instruction No. 6, is that it is not applicable to the facts of the case. This objection is clearly not well taken. Whether or not the instruction complained of is vulnerable to other objections need not be determined. It is quite apparent that plaintiffs in error were not prejudiced by the giving of the instruction. Instruction No. 8, of which complaint is made, is as follows:

"The jury are instructed that section 284 of the Criminal Code of this state provides as follows: 'Any person **not** an officer may, without warrant, arrest any person, **if** a petit larceny or a felony has been committed, and **there** has been reasonable ground to believe the person **arrested** guilty of such offense, and may detain him until **a legal** warrant can be obtained.' And in this case, if you believe from the evidence that the plaintiff assaulted one Barney Sullivan with a knife with intent to kill him, and

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if you further believe from the evidence that the defendants had reasonable grounds to believe the plaintiff guilty, then they had the right to arrest him and detain him until a legal warrant could be obtained. And if you find from the evidence that the defendants so arrested plaintiff and had reasonable ground to believe the plaintiff guilty, then you will find for the defendants."

In briefs, counsel for plaintiffs in error say that instruction No. 8 is objectionable on the ground that it purports to give a complete statement of the cases in which a private person may make an arrest without a warrant, and that by inference it excludes the right of arrest in all other cases. Assuming for the purposes of this consideration, that the instruction is vulnerable to the objection urged by counsel, we are not prepared to say that the jury were in any way misled thereby or that plaintiffs in error were prejudiced. By his separate answer, Tallmadge Kyner pleaded as a defense to the plaintiff's cause of action that Howard K. Arnold, deliberately and with premeditated malice, feloniously assaulted and stabbed Barney Sullivan, with the felonious intent to kill, wound, or maim, or do great bodily injury; that he attempted to escape; that Tallmadge Kyner gave chase, believing that Arnold was guilty of the crime of murder, and that he detained Arnold without unnecessary force until an officer arrived; that he made a complaint to this effect in writing under oath, in pursuance of which a warrant issued and the arrest followed; and as a further affirmative defense, pleaded that the facts in said complaint were true. In this condition of the record, it would seem that the instruction under consideration was responsive to the issues. It told the jury that, under section 284 of the Criminal Code, a private person is authorized to arrest a person, if there has been a felony committed, and there is reasonable ground to believe the person arrested to be guilty of such offense, and if the jury believe that Arnold assaulted Sullivan with intent to kill him, and that the defendants had reasonable grounds to believe him guilty, then his arrest would be

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justifiable. Kyner's defense was based solely upon the theory that Arnold was guilty of an assault with intent to kill; and it follows that the instruction is not bad because it is confined to the issues actually raised, and excludes from the consideration of the jury other instances of justifiable arrests by private persons not raised as a defense to the action.

A further objection urged to the instruction under consideration is that it required the jury to find that the assault was with intent to kill, and also that the defendants had reasonable grounds to believe that Arnold was guilty, before they would be authorized to find for defendants; whereas either the guilt of Arnold, or the reasonable belief of defendants in his guilt, would have been a sufficient defense. But counsel are under a misapprehension as to the law. Section 284, quoted by the court in the instruction, requires that a felony shall have been committed before a person not an officer, upon reasonable grounds, is authorized to arrest the person supposed to be guilty of such offense; and where a private person is the defendant in an action for false imprisonment, the burden is upon him to show that a felony has been committed, or the arrest will not be justified.

In *Simmerman v. State*, 16 Neb., 615, 623, this court said: "A person may resist an unlawful attempt at arrest, and, if necessary, rather than submit, may lawfully kill the person making it. That is, there must be a cause for making the arrest, a crime committed, and reasonable ground to believe that the person sought to be arrested committed the offense. When these conditions exist, the law clothes any person with power to make the arrest until a warrant can be obtained."

Should it appear that the one arrested was not the guilty party, it would still be a good defense that a felony had actually been committed, and the defendant had reasonable grounds for believing the person arrested guilty. While it would seem that an officer making an arrest without a warrant may justify upon proof that he had reason-

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able grounds for believing that the person arrested was guilty of a crime, the authorities uniformly make a distinction in respect of a private person, who, if no felony has been committed, makes an arrest without a warrant at his own peril. In *Reuck v. McGregor*, 32 N. J. Law, 70, 74, it is said: "To justify an arrest by a private person, then, it should appear that a felony had been committed, and that there was probable or reasonable ground to fairly suspect the person to be guilty." In the case of *Burns v. Erben*, 40 N. Y., 463, it is said: "An arrest by a private individual is excused only where a felony has in fact been committed, and there was reasonable ground to suspect the person arrested, although, in truth, innocent of its commission." To the same effect is *Carr v. State*, 43 Ark., 99. It is quite apparent that the giving of the instruction under consideration was not error.

We have examined certain instructions requested by plaintiffs in error and refused by the trial court, and do not think the ruling of the trial court thereon was error of which complaint can be made. The instructions requested, while they may be correct as statements of the law, are not applicable to the issues. The instructions given by the court on its own motion seem to have fairly presented the issues involved, and the verdict seems to be abundantly supported by the evidence. From a careful examination of the record, we are unable to discover any error prejudicial to the rights of plaintiffs in error, and it is therefore recommended that the judgment be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

Franklin County Bank v. Everett.

THE FRANKLIN COUNTY BANK OF HILDRETH, NEBRASKA,
ASSIGNEE, ET AL. V. LEONARD EVERETT.

FILED JULY 22, 1902. No. 12,059.

Commissioner's opinion. Department No. 2.

1. **Mortgage Foreclosure: OFFERING LAND FOR SALE IN SMALL PARCELS: OBJECTIONS: WHAT MUST BE SHOWN.** In order to set aside a sale of real estate made on a judicial decree, because the land was not offered in the smallest governmental subdivisions, it must be made to appear that the land would have brought more if so offered than it did when offered as a whole.
2. **Mortgage Foreclosure: LAND SOLD IN SMALL PARCELS BUT TO HIGHEST BIDDER PRESENT: EVIDENCE.** Where the trial court finds, upon the evidence, that the land was sold to the highest bidder actually present at the sale, such finding will not be disturbed unless it is clearly wrong.

ERROR from the district court for Franklin county.
Tried below before ADAMS, J. *Affirmed.*

E. C. Dailey, for plaintiffs in error.

Albert R. Peck, *contra*.

BARNES, C.

On the application of the defendant in error, the district court for Franklin county, on the 16th of November, 1900, confirmed a sale of real estate made upon a decree of foreclosure, and from such order of confirmation the plaintiff herein prosecutes error to this court.

There are but two assignments of error argued in plaintiff's brief. The first is that the court erred in confirming the sale, because the return "shows that the sheriff offered the whole quarter section and sold the same to the defendant in error, and does not show that it was offered in anything less than the whole quarter section." It is contended that the land described in the order of sale or decree, should have been offered in forty acre tracts and then in eighty acre tracts, and so on until enough was sold to

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satisfy the amount due upon the decree. There is no force in this objection, because the record shows that the amount of the decree was \$4,622, a first lien in favor of Leonard Everett, and \$644, a second lien in favor of the Franklin County Bank, and the entire tract of land described in the decree sold for only \$4,500. It is not shown, nor is it claimed, that if the land had been offered in forty, or in eighty acre tracts it would have brought any more than it did offered as a whole. It having brought much less than the amount of the decree, certainly the plaintiff in error sustained no injury by reason of the manner in which it was offered for sale, and finally sold.

The second objection is, "that the land was struck off to the defendant in error on a bid made by him in writing and sent to the sheriff by mail." The evidence in this case shows that a bid was sent to the sheriff by mail by the defendant in error; but it also shows that the attorney for the defendant in error (the plaintiff in the action in which the decree was rendered), was personally present at the sale and bid the sum of \$4,500 for his client. The evidence further shows that there was competitive bidding, and the \$4,500 bid made by Mr. Peck, the attorney for the defendant in error, and on which the land was struck off to him, was the highest and best bid made by any one at the sale. There was practically no conflict in the evidence offered upon the objections to the confirmation of the sale, and the court having determined that the sale was fairly conducted, that the land was sold upon the bid of Mr. Peck as attorney for the defendant in error, which was made among other bids at the sale, such finding should not be disturbed. It is further apparent that the plaintiff in error sustained no injury whatever by the manner in which the sale was conducted. Therefore the district court was right in overruling the objections and confirming the sale.

For the reasons above stated we recommend that the judgment and order of the district court be affirmed.

POUND and OLDEHAM, CC., concur.

AFFIRMED.

Helm v. Byfield.

JOHN F. HELM, APPELLANT, v. WILLIAM BYFIELD, APPELLEE.

FILED JULY 22, 1902. No. 12,061.

Commissioner's opinion. Department No. 2.

Injunction: PLEADING: SUFFICIENCY. Pleadings examined, and *held* sufficient to support the judgment.

APPEAL from the district court for Red Willow county.
Tried below before NORRIS, J. *Affirmed.*

W. R. Starr, for appellant.

W. S. Morlan, *contra.*

OLDHAM, C.

On August 28, 1899, the appellant obtained a temporary injunction restraining the appellee from going upon certain lands and molesting the crops thereon. This land belonged to the State University and appellant claimed to be in possession by virtue of a lease therefrom. The appellee answered and claimed the possession and the right thereto by virtue of a lease also from the board of regents of the State University. A trial was had in the district court for Red Willow county, which resulted in a judgment vacating the injunction and dismissing the action. From this judgment the plaintiff below appealed to this court.

After the appeal was perfected the appellee filed a motion in this court to quash the bill of exceptions, which was sustained. This leaves us nothing to consider except whether the pleadings are sufficient to sustain the judgment. In this case it will only be necessary to examine the answer. If it states a defense the judgment must be affirmed. This answer, after setting forth the lease under which the defendant claimed, contains a general denial. A general denial is a complete defense, wherefore we

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recommend that the judgment of the trial court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

OMAHA SAVINGS BANK, APPELLEE, v. JURIEN H. BOONSTRA
ET AL., APPELLANTS.

FILED JULY 22, 1902. No. 12,062.

Commissioner's opinion. Department No. 2.

Mortgage Foreclosure: PLEADING GENERAL DENIAL: BURDEN OF PROOF OF "NO ACTION AT LAW." Where, in an action to foreclose a real estate mortgage, the answer is a general denial, the burden is on the plaintiff to make a *prima facie* showing that no action at law has been had for the collection of the debt or any part thereof.

APPEAL from the district court for Douglas county.
Tried below before KEYSOR, J. *Reversed.*

Charles S. Lobingier, for appellants.

Crofoot & Scott, contra.

OLDHAM, C.

This was a suit to foreclose a real estate mortgage. The petition was in the statutory form and contained the allegation that "no action at law has been had for the collection of the debt or any part thereof." Defendant answered with a general denial. Evidently by oversight plaintiff neglected to introduce any proof tending to show that no action at law had been had. It, however, had judgment in the court below as prayed for in its petition and defendant brings the cause here on appeal.

Under the well established rules of this court this case must be reversed for this oversight, and we therefore recommend that this cause be reversed and remanded for further proceedings.

BARNES and POUND, CC., concur.

REVERSED AND REMANDED.

Link v. Reeves.

**HARVEY LINK V. JOSEPH C. REEVES, ADMINISTRATOR OF THE
ESTATE OF PRESTON REEVES, DECEASED, ET AL.**

FILED JULY 22, 1902. No. 12,063.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error: REFUSING TO DIRECT VERDICT: NOT ASSIGNED IN MOTION FOR NEW TRIAL.** The action of the trial court in refusing to direct a verdict for the defendant can not be reviewed unless assigned as error in the motion for a new trial.
2. **Appeal and Error: CONFLICTING EVIDENCE.** This court will not disturb a verdict resting on conflicting evidence unless clearly wrong.

ERROR from the district court for Douglas county.
Tried below before BAXTER, J. *Affirmed.*

J. O. Detweiler, for plaintiff in error.

B. N. Robertson, *contra.*

DUFFIE, C.

This is an action upon an indemnity bond given to John Drexel as sheriff of Douglas county. William Kaelber obtained a judgment in the district court for said county against Detlef Kai, and on July 9, 1894, caused execution to be issued thereon, which the sheriff levied upon certain crops growing upon the southeast quarter of section 12, township 14, range 11 east. One Charles Kai made claim of ownership to these crops and the sheriff demanded an indemnity bond and plaintiff secured and delivered to him the bond in suit in this action, and thereafter the sheriff advertised and sold the property seized under the execution. July 19, 1894, Charles Kai brought suit against the sheriff for a conversion of the property, and such proceedings were had in said action that judgment was entered against the sheriff for \$1,065.50. This action was appealed to the supreme court and a supersedeas bond executed with Harvey Link and Preston Reeves as sureties. The judgment was affirmed. Charles Kai then

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brought suit upon the supersedeas bond and recovered judgment against Drexel and Reeves, one of the sureties thereon, in the sum of \$1,561.85, and thereafter, by agreement among the parties in interest, Drexel applied to the satisfaction of said judgment the amount still remaining in his hands from a sale of the property seized under the Kaelber execution, and Reeves, one of the sureties in the supersedeas bond, paid the balance of said judgment amounting to \$877.86. Thereupon Drexel assigned to Reeves the indemnifying bond upon which this action was brought. Link is the only party who makes defense to the action, and he avers that he never signed the bond in suit and that his name appearing thereon is a forgery. A verdict was returned in favor of the plaintiff, and from a judgment entered upon the verdict the defendant Link has prosecuted error to this court.

After the plaintiff had rested Link asked an instruction for a verdict in his favor, which the court refused, and this is assigned as error. The defendant's motion for a new trial did not assign as error the refusal of the court to direct a verdict for the defendant, and, upon the authority of *Albright v. Peters*, 58 Neb., 534, the question cannot now be considered. In the case above cited it was said: "To review the action of the trial court in refusing to direct a verdict for a party the attention of the trial court must have been challenged thereto in the motion for a new trial."

After the summons in the case of *Kai v. Drexel* had been served, Link and Reeves called upon Drexel for the purpose of inspecting the indemnifying bond given him by Kaelber. The sheriff had lately gone out of office and his papers had been removed from the office to a store building in the city of Omaha and were in some confusion. After considerable search he was unable to find the bond, and so informed the parties, but told them, as is now claimed by Link, that one of the sureties on the bond was Christian Kaelber, the father of William Kaelber, the judgment creditor and principal in the bond. Link's son was a witness

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on the trial, and the defendant sought to prove by him that in the conversation above referred to the sheriff had said that Christian Kaelber was one of the sureties on the bond in suit. This evidence was refused by the court upon objections made by the plaintiff, and this rule is now assigned as error.

The only question in the case is the genuineness of the signature of Harvey Link to the bond in suit. It is not claimed that the bond has been changed or altered in any manner since it came into the hands of the sheriff, and we are at a loss to understand how the declarations of the sheriff as to who were sureties upon the bond would tend to show whether the signature of Link is his genuine signature or a forgery. Aside from this, Dr. Link himself testified fully in relation to this conversation, as will be shown from the following examination:

Q. Mr. Drexel at that time could not find the bond?

A. No, sir. He said Christian Kaelber was on the bond.

Q. He voluntarily said Christian Kaelber was on the bond?

A. He said Kaelber was on the bond too.

Q. That is, Christian Kaelber, the father of William?

A. Yes, sir. He says "old man Kaelber is on the bond." Reeves also testified to the same facts:

Q. Mr. Reeves, did John C. Drexel, ex-sheriff of Douglas county, Nebraska, ever at any time tell you that Christian Kaelber was on the indemnifying bond that indemnified the within John C. Drexel, sheriff, in selling Kai's crops in the case of Kaelber v. Kai?

A. Yes.

Q. At what time was this that John C. Drexel told you this?

A. Some time during 1898.

Q. Where were you and John C. Drexel when he told you that Christian Kaelber was one of the bondsmen on the said indemnifying bond?

A. In the Drexel Shoe Store.

From this it is apparent that the plaintiff in error had

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the benefit of the uncontradicted evidence of both plaintiff and defendant detailing this conversation, and the error in refusing to allow Link's son to testify to this same matter; if error it was, could not have been prejudicial.

Complaint is made by the plaintiff in error that the court refused to allow the jury an examination of the signature purporting to be that of Harvey Link upon the supersedeas bond given on the appeal of the case of *Kai v. Drexel*. When Kai brought suit upon this supersedeas bond Link defended on the ground that his signature to that bond was a forgery. Reeves did not contest his liability. The plaintiff in that action consented that judgment might go in favor of Link, and the question of his signature being forged was not submitted to the jury or passed on by the court. It is now argued that from this proceeding it was judicially established that Link's signature to the supersedeas bond was forged and that he had a right to have that signature submitted to the jury for comparison with the signature of his name upon the bond in suit in this action.

Conceding, as we are not prepared to do, that the proceeding in the case of *Kai v. Drexel* judicially established the fact that Link's signature to the supersedeas bond was forged, we know of no reason why it should be submitted to the jury in this case for comparison with the signature claimed to be his on the bond in suit. Only genuine signatures, proved or admitted to be such, can be submitted to the jury for comparison with signatures claimed as a forgery. Section 344, Code of Civil Procedure. The fact that the supersedeas bond was given in a matter connected in some degree with the facts out of which the indemnifying bond in suit in this case was given, would not have the effect of changing the rule.

The bond sued on reads as follows: "Know all men by these presents: That William Kaelber as principal, and Harvey Link as surety, of the town of Millard, county of Douglas and state of Nebraska, are held and firmly bound unto John C. Drexel, sheriff, in the penal sum of \$1,000

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good and lawful money of the United States, to be paid to the said William Kaelber, his executors, administrators or assigns," etc. It will be noticed that in one place William Kaelber is named as obligee, and it is insisted that this avoids the bond and that there is no legal liability thereon. Numerous cases are cited to the effect that the same party cannot be both obligor and obligee in a bond. In the present case there is no doubt of the intent of the parties and their purpose in executing the bond. It was to indemnify the sheriff because of the levy made at the instance of William Kaelber, the execution plaintiff. The mistake in naming Kaelber as obligee is evident and apparent. In such case the rule is well established that an honest mistake in the name of the obligee, wherefore it can not be said that the person actually intended has been sufficiently designated, does not invalidate the bond, but such person may recover under it as real obligee upon the mistake being shown to the court. And for this purpose parol evidence may be introduced. 4 Am. & Eng. Ency. Law [2d ed.], 644.

The evidence in this case was sharply conflicting. That some of the witnesses were mistaken, and honestly mistaken, can not be doubted, but it is one of the cases where the verdict of the jury settled the rights of the parties.

We recommend that the judgment of the district court be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

NOTE.—For a former decision in the above case of a jurisdictional question based upon service in an action after revivor, and service of a summons in error upon the attorney of record in the trial court, see 63 Neb., 424, 88 N. W. Rep., 670.—REPORTER.

Dempster Mill Mfg. Co. v. Lofquist.

THE DEMPSTER MILL MANUFACTURING COMPANY V. HILMA
W. LOFQUIST.

FILED JULY 22, 1902. No. 12,081.

Commissioner's opinion. Department No. 3.

Appeal and Error: INSTRUCTION WITHDRAWING VITAL ISSUE OF FACT:
CONFLICTING EVIDENCE. An instruction, which withdraws from the
consideration of the jury a vital issue of fact concerning which
there is a conflict of evidence, is erroneous.

ERROR from the district court for Phelps county. Tried
below before ADAMS, J. *Reversed.*

Hall & Reed, for plaintiff in error.

James I. Rhea, *contra.*

AMES, C.

Andrew Lofquist owned a farm which he occupied with his family as a homestead and which was subject to a mortgage for nearly its full value. In the year 1898 he was indebted to the plaintiff in error and others beyond his ability to pay. Early in that year he executed a lease of his farm for the then ensuing year to his wife, the defendant in error, Hilma Lofquist. As rent for the premises the lessee executed her negotiable note to her husband, as payee, for the sum of \$300, and the note is alleged to have been disposed of in payment of his debts. In June of that year the plaintiff in error recovered a judgment against Andrew and levied an execution upon certain grains grown and growing on the leased premises. The wife brought this action in replevin to recover the property taken in execution. The defense was that the lease was a fraudulent device for withdrawing the produce of the farm from the reach of the creditors of the husband. There was the usual conflict of evidence arising upon such an issue. At the conclusion of the trial the court of its own motion gave to the jury the following instruction:

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"Gentlemen of the jury, there has been considerable said in this case, as to the fraudulent intentions of the plaintiff and her husband, in the execution and delivery of a certain lease to the real estate upon which the crops in this controversy were grown. You are instructed that it is not necessary for you to inquire into or determine what motive actuated them in the execution of said lease. The possessory right under the lease or the interest in and to the real estate conveyed by such lease is not the subject of this action. It is the ownership of the crops grown upon said land and which were in existence at the time this action was commenced that you are first called upon to determine, and you need only consider the lease in so far as it may aid you in determining such ownership. And in making up your verdict on that question you should not consider the question of fraudulent intent, to hinder, delay, or defeat the defendant in the collection of his judgment or claim held against the husband, entered into such transaction, neither should you consider claims under the exemption laws of our state, for neither the question of fraud or claim to exemptions under the pleadings and evidence enter into the question as to who was the owner of the crops levied upon at the time this action was commenced."

A verdict was returned and a judgment rendered for the plaintiff, which the defendant seeks to have reversed by this proceeding. Among the errors assigned is the giving of the foregoing instruction. The assignment is well made. Even an unattentive reading of the instruction discloses that it withdrew from the consideration of the jury the vital issue in the case, and was equivalent to an instruction to return a verdict for the plaintiff. In the condition of the record the court was not warranted in so doing.

It is recommended that the judgment of the district court be reversed and a new trial granted.

DUFFIE and ALBERT, CC., concur.

REVERSED AND REMANDED.

Hansen v. Anderson.

CARL A. HANSEN V. MADS ANDERSON.

FILED JULY 22, 1902. No. 12,087.

Commissioner's opinion. Department No. 3.

Appeal and Error: NO ASSIGNMENT AS TO OVERRULING MOTION FOR NEW TRIAL.

ERROR from the district court for Kearney county.
Tried below before ADAMS, J. *Affirmed.*

E. C. Dailey, for plaintiff in error.

J. L. McPheeley, contra.

DUFFIE, C.

This is an action of ejectment brought to recover possession of a strip of ground which the plaintiff below claims as a part of the south half of the northeast quarter of section 25, township 5, range 14, in Kearney county. The defendant below claims the strip as a part of the southeast quarter of the northwest quarter of said section 25, and also claims to be entitled thereto because of his actual adverse possession of the strip for more than ten years prior to the commencement of the action. A verdict was returned in favor of the plaintiff in the district court and, judgment having been entered on the verdict, the defendant has taken error to this court.

No error is assigned upon the order of the court overruling the motion for a new trial, and this, under the now settled rule of the court, is fatal to a review of the other errors assigned. We have, however, looked into the record and are satisfied that there is no reversible error in the instructions of the court and that the verdict of the jury finds support in the evidence.

We recommend that the judgment of the district court be affirmed.

AMES and ALBERT, CO., concur.

AFFIRMED.

Chicago, B. & Q. R. Co. v. Dundy County.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT, v. DUNDY COUNTY, NEBRASKA, ET AL., APPELLEES.

FILED JULY 22, 1902. No. 12,095.

Commissioner's opinion. Department No. 2.

1. **Waters and Water Courses: IRRIGATION: BONDS FOR: TAXATION.** *Cummings v. Hyatt*, 54 Neb., 35, followed.
2. **Bonds: RECITAL TO ISSUE ON CERTAIN DATE: NOT CONCLUSIVE: NOTICE.** While a recital in bonds that they were ordered to be issued on a certain date would be notice of their invalidity to all persons acquiring them, if issued prior to the time fixed by law, the recital is not conclusive, but, if such was the fact, it may be shown that they were not ordered to be issued and were not issued until after the expiration of the statutory period.
3. **Bonds, Municipal: DATE ON FACE NOT CONCLUSIVE AS TO WHEN ISSUED.** The date at which municipal bonds were issued is to be determined from the time at which the municipality actually parted with the custody and control of them, pursuant to contract, and not necessarily from the date which they bear on their face.

APPEAL from the district court for Dundy county. Tried below before NORRIS, J. *Affirmed.*

Gaines, Kelby & Storey, for appellant.

Frederick Shepherd, contra.

POUND, C.

This suit was brought to enjoin the collection of taxes for payment of interest upon certain bonds voted by Haigler precinct in Dundy county, and issued by the county commissioners on behalf of said precinct, under section 14, chapter 45, Compiled Statutes. The bonds were issued to aid the Haigler Land & Canal Company in constructing certain irrigation ditches in said county. Counsel have presented a plausible and able argument to the effect that the tax is not levied for a public purpose and that there is no law in this state authorizing a municipality to donate bonds in aid of irrigation companies. With one exception, which will be noticed presently, we think all the points made by counsel under these heads

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are foreclosed by *Cummings v. Hyatt*, 54 Neb., 35. The language of said section 14, chapter 45, differs not a little from that of section 1 of said chapter, and is such as to suggest an intention to limit its scope to the internal improvements therein mentioned. But the bonds in question in *Cummings v. Hyatt* were issued under that very section, and the court held that they were authorized thereby. This decision has stood in the books for several years, and we have no doubt that bonds have been issued, bought, sold and contracted for on the faith thereof. Under such circumstances, whatever we might do if the question were *res nova*, we have no disposition to adopt a contrary rule. It is suggested that this case differs from *Cummings v. Hyatt*, in that the articles of incorporation of the Haigler Land & Canal Company contain certain provisions authorizing it to do other business of various kinds, in addition to the construction and operation of the canal, and another provision which is construed as limiting the right to use the canal to stockholders of the corporation. With reference to the first point, it is enough to say that the bonds were issued expressly to aid in the construction of the canal and not in furtherance of the general business of the company. Promoting the construction and operation of the canal was a public purpose, and the money was donated for that purpose only. As to the other point, the company contracted in writing to furnish water to all subscribers therefor within the precinct upon specified terms as to price and amount, and one of the objects of its incorporation, as stated in its articles, is to convey and distribute water "to the lands of holders of the water rights of said company." There is another provision giving the corporation general powers of operating and maintaining ditches and canals for irrigation purposes. Under these several provisions we are satisfied that the company had power to contract to supply water to the public generally in Haigler precinct, and that the furtherance of its canal in that precinct became a public enterprise.

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It is contended further that the bonds are invalid by reason of a recital that they were ordered to be issued on a date specified which is prior to the expiration of the period fixed by law after the election. Were this recital true, and had the bonds been issued prior to the time so fixed, it would be notice of the invalidity of the bonds to all persons acquiring them. But we do not think the recital is conclusive, nor does the case of *Wilbur v. Wyatt*, 63 Neb., 261, 88 N. W. Rep., 499, cited by counsel, require us so to hold. In that case the bonds were invalid, and the recital afforded notice of such fact. Here they were valid. Although they bear date October 1, 1891, and recite an order directing them to be issued on October 22, 1891, the parties have stipulated that they were issued after the delivery of a certain bond, which was not executed till December, 1891. Moreover, the order of the county commissioners directing that they be delivered to the company is in the record, and bears date February 8, 1892, and there is evidence that they did not leave the control of the county commissioners nor come to the hands of the company till after that date. The date at which the bonds were issued is to be determined from the time at which the municipality actually parted with the custody and control of them pursuant to contract and not necessarily from the date which they bear on their face. *School District No. 42 of Pawnee County v. First National Bank of Xenia*, 19 Neb., 89; *Village of Kent v. Dana*, 100 Fed. Rep., 56, 64. The presumption is that the word "issue" in the statute is used in its ordinary acceptance, and the sense it usually bears as shown by dictionaries in common use is "to send out, to put into circulation, to deliver for use." There can be no reason for any other construction of the word issue in this connection. The bonds being valid, the recital in question of itself can not invalidate them.

We therefore recommend that the decree of the district court be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

Hillers v. Yeiser.

JOHN B. HILLERS, APPELLEE, v. GEORGE O. YEISER, APPELLANT, ET AL.

FILED JULY 22, 1902. No. 12,107.

Commissioner's opinion. Department No. 3.

Taxation: FORECLOSURE OF LIEN.

APPEAL from the district court for Webster county. Tried below before ADAMS, J. *Affirmed.*

John O. Yeiser, for appellant.

George R. Chaney, contra.

AMES, C.

This is an appeal from a decree of foreclosure and sale to satisfy a tax lien upon real estate. The point urged is that the evidence is insufficient to support the decree. The evidence is somewhat scant, but there seems to be no real question about the existence and validity of the lien, which is for a small amount, and a part of which seems to have been paid since the judgment. Upon the whole record we think the evidence suffices to uphold the decree of the district court, and we recommend that it be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

JOHN B. HILLERS, APPELLEE, v. GEORGE O. YEISER, APPELLANT, ET AL.

FILED FEBRUARY 17, 1903. No. 12,107.

Commissioner's opinion. Department No. 2.

Appeal and Error: ADMISSION AND EXCLUSION OF EVIDENCE ON APPEAL.
Action of the trial court in admitting and excluding evidence can not be reviewed upon appeal.

Hillers v. Yeiser.

REHEARING of case reported *ante*, page 394.

APPEAL from the district court for Webster county. Tried below before ADAMS, J. *Judgment below re-affirmed.*

John O. Yeiser, for appellant.

George R. Chaney, *contra*.

OLDHAM, C.

The former opinion in this case was written by AMES, C., and may be found reported *ante*, page 394, and in 91 N. W. Rep., 1126. The only question presented is that the evidence is not sufficient to support the judgment. We have examined the bill of exceptions and are satisfied that the conclusion of the learned commissioner at the former hearing was right. While there might have been some question as to whether a sufficient foundation was laid for the admission of the tax deed and tax certificates, yet this is a question that we can not review upon appeal. If appellant relied upon any objection to the action of the trial court in admitting or excluding evidence he should have filed a motion for a new trial and brought the case here on error.

It is therefore recommended that the former opinion be adhered to and the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

FORMER OPINION OF AFFIRMANCE ADHERED TO.

Second opinion on rehearing follows.

Hillers v. Yeiser.

JOHN B. HILLERS, APPELLEE, v. GEORGE O. YEISER, APPELLANT, ET AL.

FILED SEPTEMBER 17, 1903. No. 12,107.

Commissioner's opinion. Department No. 1.

Taxation: FORECLOSURE OF LIEN: EVIDENCE: SUFFICIENCY. Evidence examined, and held insufficient to sustain the judgment of the district court.

Second REHEARING of case reported *ante*, page 394.

APPEAL from the district court for Webster county. Tried below before ADAMS, J. *Judgment below reversed.*

John O. Yeiser, for appellant.

George R. Chaney, *contra*.

OLDHAM, C.

This case has been twice before this court. (*Ante*, page 394, 91 N. W. Rep., 1126, and 93 N. W. Rep., 989.) While the question of the sufficiency of the testimony to sustain the judgment was raised, our attention was never particularly called to the exact state of the record, as to the total want of any evidence to show the amount paid either by plaintiff or his assignee, for the tax certificates on which the action to foreclose was based. The plaintiff at the trial introduced the evidence of the purchaser of the tax-sale certificates, who testified that he was the purchaser, and that he assigned the certificates for a valuable consideration to the plaintiff in this action, and afterwards procured a tax deed on the certificate and assigned that to the plaintiff. A paper purporting to be a tax deed executed by the county treasurer was introduced on plaintiff's behalf. This paper, however, merely described the lots, and does not recite any consideration as having been paid for them. This was all the evidence introduced tending to show the

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amount due plaintiff on his tax liens. It is, therefore, apparent that there is a total want of testimony in the record to show the amount of defendant's indebtedness, and as his answer was a general denial, evidence of this nature is necessary to sustain a decree.

It is therefore recommended that the former judgment of this court be vacated, and that the judgment of the district court be reversed and the cause remanded for further proceedings.

HASTINGS and AMES, CC., concur.

The former judgment of this court is vacated, and the judgment of the district court reversed and the cause remanded for further proceedings.

JUDGMENT BELOW REVERSED.

A. B. ALPIRN V. M. I. GOODMAN ET AL.

FILED JULY 22, 1902. No. 12,109.

Commissioner's opinion. Department No. 1.

1. **Attachment:** DISCHARGE OF, BY FINDING AND JUDGMENT. A finding and judgment for defendant *ipso facto* discharges an attachment.
2. **Attachment:** QUESTION OF OWNERSHIP LITIGATED WITHOUT OBJECTION: SUBSEQUENT OBJECTION TO JURISDICTION TOO LATE. Where one of several defendants denies separately plaintiff's allegations and claims in his answer sole ownership of attached property, and plaintiff traverses the claim of ownership and that question is litigated in both county court and on appeal in district court, without objection, it is too late after final judgment in favor of that defendant to assert that the district court was without jurisdiction to determine ownership of the property in that action.

ERROR from the district court for Douglas county.
Tried below before SLABAUGH, J. *Affirmed.*

L. D. Holmes, for plaintiff in error.

Crane, Crane & Erwin and J. J. Boucher, contra.

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HASTINGS, C.

The plaintiff complains of error of the district court: 1st—In finding that the car-load of junk, attached in this case, was the property of M. I. Goodman, for that such finding was contrary to law and against the clear weight of evidence; 2d—In that there was no jurisdiction in the case, there having been no judgment for or against Goodman in the county court from which he could appeal; 3d—Error in discharging the attachment without any issue thereon having been made; 4th—The finding that the sale of the property by Kremenchuck & Co. was in good faith, is not supported by the evidence; 5th—Error in rendering judgment for costs in favor of M. I. Goodman and also in favor of M. Kahlman; 6th—Error in making and finding in reference to the attached property because no issue was raised upon it by motion in the district court; 7th—Error in making any finding as to the attached property with no motion, supported by affidavit, to discharge attachment; 8th—Error in overruling motion for new trial.

Of these errors only two are urged in plaintiff's brief; that the district court was without jurisdiction with reference to Goodman, there having been no judgment against him in county court from which he could appeal; and, second, that there had been no motion made to discharge the attachment, and none was submitted to the court before final judgment. So far as this last point is concerned it seems entirely immaterial; judgment was, by the district court, rendered in favor of the defendant, Goodman. Such a judgment *ipso facto* discharged the attachment. Code of Civil Procedure, section 227; *Clap v. Bell*, 4 Mass., 99; *Johnson v. Edson*, 2 Aik. [Vt.], 299; *Ranft v. Young*, 21 Nev., 401; *Loveland v. Mining Company*, 76 Cal., 562; *Suydam v. Huggeford*, 40 Mass., 465. The entry of an express order discharging the attachment as to M. I. Goodman did not serve any more effectually to do away with it than did merely the general finding and judgment in his favor.

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In the county court a finding was made in favor of M. I. Goodman but no judgment of dismissal entered. That court, however, found that the car-load of junk was the property of Kremenchuck & Co., and was rightfully attached, and ordered it sold. This was done in despite of Goodman's answer, which not only denied his liability for the debt sued on, but expressly claimed ownership of the property. Judgment was entered against Kremenchuck & Co., A. P. Kremenchuck and M. K. Kahlman without any mention of the defendant, M. I. Goodman. Kahlman and Goodman each appealed,—Goodman, from so much of the judgment as sustained the attachment and ordered the property sold, and Kahlman, from the judgment for a recovery against him. On the appeal the action was tried on a petition copied from that of the county court, resulting, as above stated, in a judgment against Kremenchuck & Co., and a finding in favor of M. I. Goodman and Kahlman, and that the property attached belonged to M. I. Goodman, a dismissal as to them, and an order for the restoration to Goodman of the property.

It is now insisted that the general finding in favor of M. I. Goodman as to the indebtedness and the finding that the property attached was not his but Kremenchuck & Co.'s, and the ordering of it sold by the county court, did not constitute a final judgment as against Goodman, nor one from which he could appeal. It is therefore claimed that the district court had no jurisdiction as to him, and that its finding and judgment in his favor as to the ownership of the property was erroneous because without jurisdiction.

Plaintiff commenced his action against all of the defendants, including M. I. Goodman, and procured the property to be attached as the property of the defendants. Goodman's answer put in issue his indebtedness and asserted his ownership of the junk as has been said. The latter issue the county court determined against Goodman. He appealed to the district court. Both questions were there again litigated without objection by plaintiff.

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This time the court found for Goodman on both of them. Final judgment of dismissal was entered and it was ordered that the property be restored to him.

In *Ranft v. Young*, 21 Nev., 401, under a statute almost identical with ours as to the effect of judgment for defendant in an attachment case, a denial of an application, made after judgment for defendant, to discharge an attachment, and a holding that it was still in force pending a motion for a new trial, was held void and unappealable. It is held that the general property remains in defendant. By judgment in his favor the attachment is *ipso facto* dissolved. If the sheriff detains the property he must answer in trover.

In *Kimbrow v. Clark*, 17 Neb., 403, the wife of a defendant intervened and set up ownership of attached lands. Judgment was entered for plaintiff and the land ordered sold without any express adjudication as to the wife's title. A creditors' bill was then brought to enforce the lien of the judgment, and when the wife again set up her title, it was claimed to have been adjudicated against her in the attachment case. It was held that ownership of the property by a third person was in no way in question in the attachment case, was not expressly adjudicated upon, and was unaffected by the proceedings in that case.

In *Jackman v. Anderson*, 33 Ark., 414, a judgment directing a return of property to a defendant in attachment on a finding in his favor was affirmed.

In *Berry v. Callahan*, 15 Ky. Law Rep., 539, on judgment for one defendant in attachment, where his claim to be sole owner of the property was denied, it was held that the issue so raised should be determined before the property should be returned to him. The case seems not to be reported in full.

In this case the property had been taken from Goodman. It was in the officer's hands. The question of Goodman's sole ownership was raised by the terms of the petition, as well as by his answer. It would seem that so far as the question of ownership could be settled between these

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parties is was done. Doubtless Goodman on a final judgment in his favor was remitted to the same position with regard to this property which he had before the writ issued. As between him and the attaching officer, he no doubt had the same rights as any third person from whose possession property had been taken in the action. It does not seem, however, that where the question of ownership has been, as between him and the attaching creditor, voluntarily submitted by both parties to the county court, that its determination was without effect. The voluntary submission of this question by both parties rendered its adjudication binding upon both of them as against each other. The fact that Goodman was not bound to claim ownership, nor plaintiff to litigate it in this action, would not prevent its determination from being final as between them, where in fact they did litigate it without objection. If the county court's action was, as between plaintiff and Goodman, a valid determination of the ownership of the junk because of the voluntary submission of that question to that court, a right of appeal remained to Goodman as to that question and jurisdiction attached in the district court to pass upon it. This was done again without objection by plaintiff until after the adverse decision.

It is recommended that plaintiff's claims of error in discharging an attachment after judgment for defendant, and also in the court's assuming to decide as to the ownership of the attached property on the part of the dismissed defendant, where the question had been submitted without objection by either party, be overruled and the judgment of the district court affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

Kennedy v. Parmele.

FRANK A. KENNEDY, APPELLANT, v. CHARLES C. PARMELE,
APPELLEE.

FILED JULY 22, 1902. No. 12,112.

Commissioner's opinion. Department No. 3.

Contracts: SPECIFIC PERFORMANCE: PLEADING. Petition asking specific performance of a contract for the sale of real estate examined, and held subject to demurrer.

APPEAL from the district court for Douglas county.
Tried below before ESTELLE, J. *Affirmed.*

George A. Magney, for appellant.

Byron Clark and *C. A. Rawls*, contra.

DUFFIE, C.

This action was commenced in the district court for Douglas county to compel specific performance of a contract for the sale of certain real estate. A demurrer was interposed to the petition, and sustained, and the case is brought here on appeal.

The question at issue is, whether the letters set out in full below, constitute a contract such as can be enforced by a court of equity:

"PLATTSMOUTH, NEB., 6-18, 1900.

"*F. A. Kennedy, Esq., Omaha.*

"DEAR SIR: In reply to your letter of June 16, will take \$600 for lot 24, B. 1, Y and H addition; one-third cash; balance 6 per cent. annual interest; time to suit purchaser.

"Yours truly,

CHARLES C. PARMELE"

To this the plaintiff replied:

"OMAHA, NEB., June 20, 1900.

"*Charles C. Parmele, Plattsmouth, Neb.*

"DEAR SIR: Yours of the 18th received. I find that the lot that pleased me is lot No. 1, block 1—the N. E. corner

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of block. When I first looked at the map I got the idea that it was lot 24 of block 1. I do not feel as though I should pay \$600 for it as I much prefer to put the money in a house. I thought of giving \$500. Mr. Kierstead is anxious for me to get that corner and put up a little home. I believe that my taking that corner will start a healthy sale of the lots in your block. It will be pretty lonesome as it is and I will feel a personal interest in getting a few neighbors of an agreeable kind. Mr. Kierstead informed me at the board meeting last night that a sewer is to be put down on 20th street this year; that the ordinance was in course of preparation now. I hope you can see your way clear to let me have lot 1 for \$500. I believe I would take it at that figure.

"Yours truly,

F. A. KENNEDY."

To the above letter the defendant, Parmele, replied as follows:

"PLATTSMOUTH, NEB., June 26, 1900.

"F. A. Kennedy, Esq., Omaha.

"DEAR SIR: In reply to your letter of June 19, will sell lot 1, block 1, Y. and H., for \$500. Will be in Omaha in a few days and will call and see you if you will let me know where I can find you.

"Yours truly,

CHARLES C. PARMELE."

To this Kennedy replied as follows:

"OMAHA, NEB., June 30, 1900.

"Charles C. Parmele, Plattsmouth, Neb.

"DEAR SIR: Thinking you have abandoned your intended visit I write you. Yours of 26th in which you say you will sell me lot 1, block 1, Yates and Hemples' addition, for \$500, is satisfactory to me.

"This is of course with the understanding that the lot will be turned over to me clear, and that you will furnish me with an abstract of the property. I will pay you \$50 down and \$50 per month at 6 per cent. That would be most convenient for me.

"Or I will pay you \$200 down and \$100 for five, eight

Kennedy v. Parmele.

and ten months at 6 per cent. I would like to get this matter closed up and off my mind as soon as I can.

"Yours,

F. A. KENNEDY."

Parmele's letter of June 18 refers to lot 24 and not to lot 1, and can not, therefore, be considered as any part of the negotiations for the sale of lot 1. The only proposition made by Parmele in relation to the sale of lot 1 is contained in his letter of June 26, in which he offers the lot for \$500. This, on its face, contemplates a cash payment of the whole consideration, and nowhere in the correspondence is that offer accepted by Kennedy. The plaintiff, however, insists that Parmele's letter of June 18, relating to the times of payment, ought to be considered as fixing the terms of payment of the \$500 consideration for which lot 1 was offered. While we can not agree to this construction of the correspondence, we do not think that the plaintiff would be aided should we accept that theory. By the letter of June 18 the terms of payment were fixed as follows: "one-third cash, balance six per cent. annual interest; time to suit purchaser." The terms proposed in Kennedy's letter of June 30, under which he claims to have accepted the proposition made by Parmele in his letter of June 26, are as follows: "I will pay you \$50 down and \$50 per month at six per cent. Or I will pay you \$200 down and \$100 for five, eight, and ten months at six per cent." Saying nothing about an abstract of title being made a condition of the sale, it will be seen that the terms of payment proposed do not comply with the terms demanded by Parmele in his letter of the 18th of June. The \$200 cash payment is more than one-third of the purchase price, and, while the vendor does not usually object to the payment of cash, there may be circumstances under which he might not be willing to accept a greater cash payment than that proposed. That he has a right to make such terms as he sees fit, can not be denied, and these terms can not be modified in any manner by the court. To do so would not be to enforce a contract entered into between the parties but to make a new contract for them.

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The district court was right in sustaining the demurrer and we recommend that the order appealed from be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

JOHN A. DOE ET AL. V. UNITED STATES OF AMERICA FOR THE
USE AND BENEFIT OF THE ROCK ISLAND LUMBER &
MANUFACTURING COMPANY ET AL.

FILED JULY 22, 1902. No. 12,130.

Commissioner's opinion. Department No. 1.

Trial: INSTRUCTIONS MISSTATING AMOUNT SUED FOR: OTHERS STATING IT CORRECTLY: VERDICT CORRECT. Where the correct amount sued for is repeatedly stated in a lengthy set of instructions, one that the jury should under certain circumstances find for the plaintiff in "the full amount sued for, to wit: \$2,969.20 with interest," etc., is not prejudicial error, though the full amount sued for was only \$1,384.20 and interest, where the verdict is expressly for the latter amount and certain interest which is expressly computed and stated in the verdict.

APPEAL from the district court for Douglas county.
Tried below before ESTELLE, J. *Affirmed.*

T. W. Blackburn, for plaintiffs in error.

Bartlett, Dundy & Martin and *Richard S. Horton*,
contra.

HASTINGS, C.

The error argued in the briefs in this case is the giving of an instruction in which the court told the jury that if they found certain allegations of the plaintiff, which had been denied, were true, and did not find in favor of the defendant, O. J. King, on his counter-claim, they should return a verdict for the plaintiff "for the full amount sued for, to wit: \$2,969.20 with interest from the 1st day of August, 1897, up to the first day of October,

Doe v. United States of America.

1900." "The full amount sued for," in fact, as the jury had been previously told, was \$1,384.20 and interest. The jury returned a verdict as follows: "We, the jury duly impaneled and sworn to try the issue joined between the said parties, do find for the said plaintiff and against defendants, Orlando J. King, John A. Doe and Albert C. Foster, and assess its damages in the sum of dollars 1,384.20 and interest at 7 per cent. to October 1, 1900.

301.87

1,686.07"

This amount was in accordance with the prayer of the petition. O. J. King set up a counter-claim sufficient to overcome this, and to entitle him to a judgment of \$711. The defendants, Doe and Foster, were sureties upon a bond of King as contractor, and were liable as sureties on his behalf for the amount actually due. The evidence has not been preserved and all there is before us are the instructions of the court, which are voluminous, the pleadings, and the verdict.

The plaintiff's claim was for materials alleged to have been used in the construction of a post-office building for the United States at Salina, Kansas; the original amount of the account was as stated by the court in the instruction quoted, but payments to the amount of \$1,585 are admitted in plaintiff's petition, and judgment for only \$1,384.20 and interest was demanded; the jury had been so told in the instructions; the defendant, King, admitted his contract with the United States government, admitted the contract with plaintiff, and the furnishing of material for such construction, but alleged a failure on plaintiff's part to comply with its contract in the matter of time, and by reason of such failure his damage in the sum of \$1,193; alleged further an expense of \$100 in the procurement of material for building and a large expense in working over and putting in proper condition the material which plaintiff had furnished, and that the payments made were more than the value of the material he had

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used; the sureties answered alleging compliance with his contract on the part of King and denying plaintiff's allegations. As above stated, the sole error relied upon is the misstatement by the court in his instruction of the amount claimed; a similar misstatement occurs in one other place in the instructions, but was in immediate proximity to a statement that payments of \$1,585 were admitted and that the judgment demanded was \$1,384.20. The jury was told, under certain circumstances, to find "the full amount sued for to wit: \$2,969.20." This instruction was evidently accepted in its proper and intended meaning. We do not think that this error in misstating the amount misled or deceived the jury, or that it furnishes any good ground for sending this case back for another trial. The record discloses that the hearing began on November 15, and proceeded on the 16th, 19th, 20th and 21st, when the jury was instructed. The amount and form of the verdict seem to show that during this time the jury, at least, had learned how much the action was for.

The petition in error complains only of the fourth instruction, and of the overruling of the motion for a new trial. The motion for a new trial contained forty-three assignments of error, and consequently a reference to it points out no special error. The only error which can be considered here is the giving of this fourth instruction. As this verdict is for the actual amount prayed in the petition and interest thereon, it seems clear that the jury meant to disregard the counter-claim; and to find in favor of the plaintiff's denied allegations. The trial court's summary of the pleading is clear and full, filling some ten pages of the record, and repeatedly refers to the correct amount and to the payments which had been made.

It is recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

McIntosh v. City of Omaha.

JAMES H. MCINTOSH, APPELLEE, V. THE CITY OF OMAHA,
APPELLANT.

FILED JULY 22, 1902. No. 12,138.

Commissioner's opinion. Department No. 2.

Pleading: DENIAL ON "INFORMATION AND BELIEF." To authorize the denial of an allegation in a petition, a want of belief is sufficient, and it is not improper to accompany the denial with a statement that the party making it has no knowledge or information on which to form a belief.

APPEAL from the district court for Douglas county.
Tried below before KEYSOR, J. *Reversed.*

James H. Adams and Charles E. Morgan, for appellant.

James H. McIntosh, contra.

A denial in a pleading because the defendant is not sufficiently informed is not authorized by the Code, is insufficient, and amounts to an admission of the allegation to which it relates. *Swinburne v. Stockwell*, 58 How. Pr. [N. Y.], 312; *Stickney v. Hanrahan*, 63 Pac. Rep. [Idaho], 189.

A mere demand of proof because the defendant is not sufficiently informed presents no issue for trial. *National Life Ins. Co. v. Martin*, 57 Neb., 350; *First National Bank of Chicago v. Stoll*, 57 Neb., 758.

The defendant, having the means of information at hand, will not be permitted to deny the fact because he is insufficiently informed. *Oakes v. Ziemer*, 61 Neb., 6; *Mills v. Town of Jefferson*, 20 Wis., 54; *Goodell v. Blumer*, 41 Wis., 436; *Wallace v. Bacon*, 86 Fed. Rep., 553; *Mulally v. Townsend*, 119 Cal., 47.

Denial because of lack of information is not aided by the subsequent allegation denying every allegation in the petition contained except as therein admitted to be true. *Phoenix Ins. Co. v. Meier*, 28 Neb., 124; *Gray v. Ebling*, 35 Neb., 278.

OLDHAM, C.

This was an action to enjoin the collection of a special assessment for curbing and paving taxes levied on certain lots situated in the city of Omaha. The petition alleged, among other things, that the plaintiff was the owner of the lots described in the petition. Defendant answered the petition with reference to the ownership of the lots as follows: "As to whether plaintiff is the owner of the property set forth in the petition defendant is not sufficiently informed and therefore denies the same." On issues thus joined plaintiff had judgment in the court below as prayed for in his petition, and the defendant city brings the cause to this court on appeal.

Only one question is called to our attention in the brief of appellant and that is that no evidence was introduced in the court below tending to prove plaintiff's ownership of the lots described in the petition. Plaintiff admits that no evidence was introduced in the court below tending to show his ownership of the lots in controversy, but claims that defendant's answer, above set out, is an evasive answer and raises no issue of ownership and should be treated as a sham and as an admission of the allegations in the petition with reference to the ownership of the lots. No attack was made on this answer either by motion or demurrer in the court below, but instead a reply was filed and the cause proceeded to trial without any objection to the terms of the answer; consequently the liberal rule which applies to the construction of a pleading when attacked for the first time in this court must be invoked in the case at bar.

Appellee contends that the answer of defendant is not a denial because it is only based on "information and belief," and, second, because the question of ownership of the lots could be ascertained from the records of Douglas county, and that where absolute knowledge of a fact in issue is within the reach of a pleader he will not be permitted to deny such fact on "information and be-

McIntosh v. City of Omaha.

lief." In support of this latter proposition numerous authorities are cited including the recent decision of this court in the case of *Oakes v. Ziemer*, 61 Neb., 6.

If plaintiff had alleged in his petition that he was the owner of the lots in controversy by deed of record in Douglas county, then we think his contention would be well founded; for *Oakes v. Ziemer, supra*, established the rule in this state that a denial of a matter of public record within the reach of the pleader on information and belief is not a "full answer," and we have no disposition to recede from anything that was said in that case. But in the case at bar plaintiff did not allege that he was an owner of record of the lots in controversy, and it would be useless to urge that the records of a county are the only proof of all the land titles within the county. For aught we know from plaintiff's petition he might be the owner of the lots by adverse possession, or as the grantee in an unrecorded deed, or as heir under a will probated in a foreign state. Because there was nothing in the pleading that disclosed plaintiff's claim of a record ownership of the lands we do not think that this case falls within the rule announced in *Oakes v. Ziemer, supra*.

Maxwell, in his work on Code Pleading, page 386, says: "All that the Code requires of a pleader is good faith—that he shall state the facts as he believes them to be; therefore, if a defendant has no knowledge or information on which to form a belief of the truth of the facts stated in the petition, he may deny the same, and, if he see fit, may accompany the denial with a statement of his want of knowledge. That is, that the defendant has no knowledge or information whereon to form a belief as to the matters stated in the petition, and therefore denies the same. If, however, the defense is of such a nature that it is apparent that he could ascertain the truth in regard to the charge made in the petition, as where the facts are in a public record, this form of denial is not available. If permitted to remain in the answer, however, the allegations will be sufficient to constitute a denial." This doc-

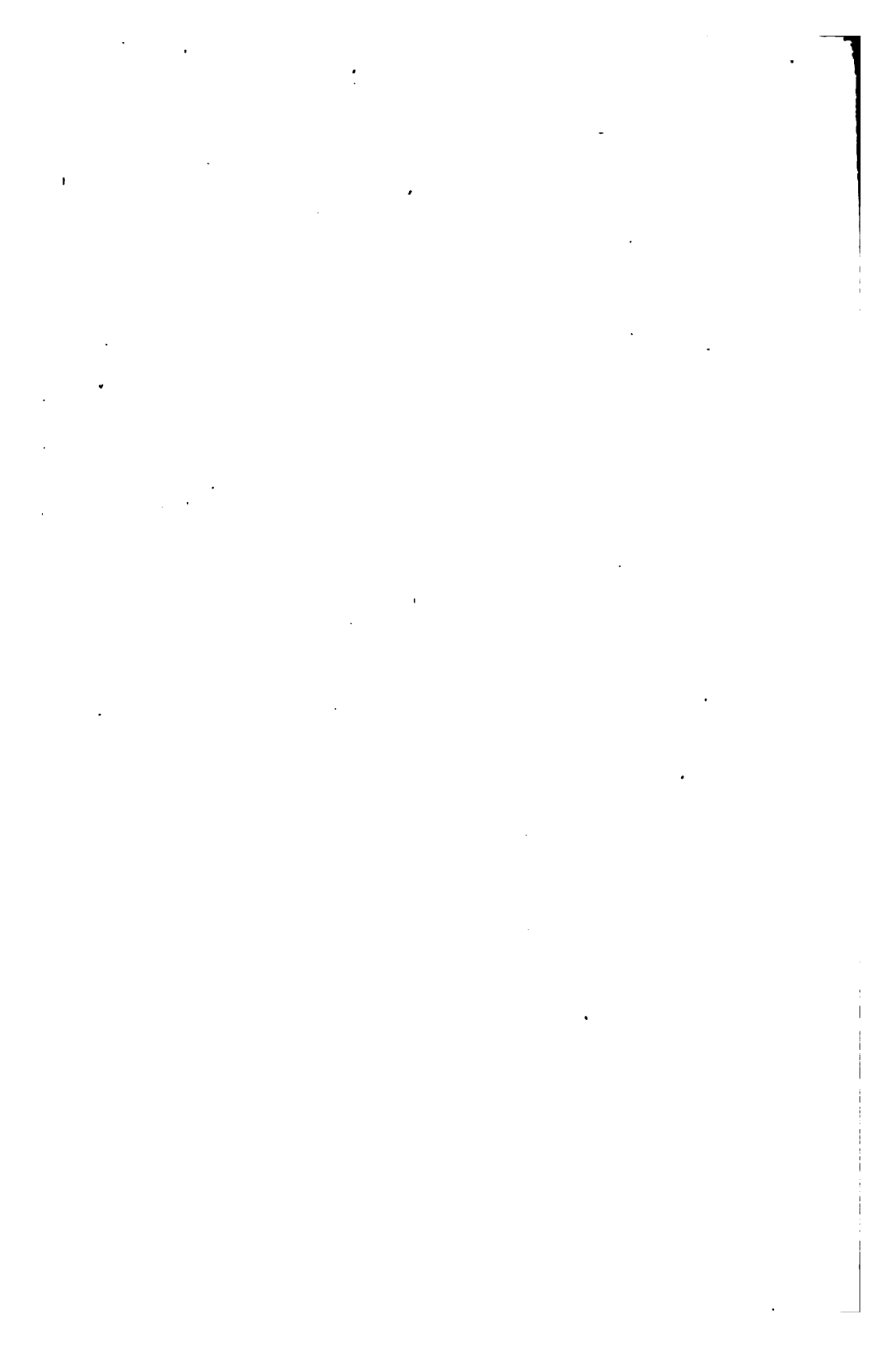
McIntosh v. City of Omaha.

trine is supported by the supreme court of Ohio in *State v. Commissioners of Hancock County*, 11 Ohio St., 183, in which the rule is announced that "To authorize a denial of an allegation in a petition, a want of belief is sufficient, and it is not improper to accompany the denial with a statement that the party making it has no knowledge or information on which to form a belief." This view is also sanctioned in Boone, Code Pleading, section 62.

We are therefore of the opinion that the allegation of defendant's answer is sufficient to put plaintiff's title in issue, and as it is conceded that no evidence was introduced in the court below to support the allegations of plaintiff's ownership of the lots in controversy we recommend that the judgment of the district court be reversed and this cause remanded for further proceedings.

BARNES and POUND, CC., concur.

REVERSED AND REMANDED.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1902.

PRESENT:

HON. J. J. SULLIVAN, CHIEF JUSTICE.
HON. SILAS A. HOLCOMB,
HON. SAMUEL H. SEDGWICK, } JUDGES.

DEPARTMENT No. 1.
HON. WILLIAM G. HASTINGS,
HON. GEORGE A. DAY,*
HON. CHARLES S. LOBINGIER,†
HON. JOHN S. KIRKPATRICK,

DEPARTMENT No. 2.
HON. JOHN B. BARNES,
HON. WILLIS D. OLDHAM,
HON. ROSCOE POUND, } COMMISSIONERS.

DEPARTMENT No. 3.
HON. EDWARD R. DUFFIE,
HON. JOHN H. AMES,
HON. I. L. ALBERT,

**IN THE MATTER OF THE ESTATE OF WILLIAM C. BISSELL,
DECEASED: ORLAN THOMAS ET AL. V. JOHN HOLMAN.**

FILED SEPTEMBER 18, 1902. No. 10,833.

Commissioner's opinion. Department No. 3.

Wills: BEQUEST: CONVEYANCE IN TRUST: ACTION BY HEIRS.

**ERROR from the district court for Richardson county.
Tried below before LETTON, J. *Affirmed.***

* Until October 20, 1902.

† After October 22, 1902.

Stitzer v. Whittaker.

I. E. Smith, Ed. Falloon, S. P. Davidson and Reavis & Reavis, for plaintiffs in error.

F. Martin and C. Gillespie, contra.

DUFFIE, C.

This case was argued and submitted with the case entitled *Thomas v. The National Christian Association*, 63 Neb., 585, in which an opinion was filed January 8, 1902. Both cases involved the same questions and it was the intention of the author of the opinion filed to cover both cases. Through inadvertence the judgment in the case of *Thomas v. The National Christian Association* was alone affirmed, and we now recommend that the judgment in this case be affirmed for the reasons given in that case.

ALBERT and AMES, CC., concur.

AFFIRMED.

CHARLES A. STITZER, APPELLANT, v. JOHN B. WHITTAKER,
TRUSTEE FOR MINOR HEIRS, ET AL., APPELLEES.

FILED SEPTEMBER 18, 1902. No. 11,644.

91 NW 713

Commissioner's opinion. Department No. 2

1. **Trusts: TRUSTEE MAY DO WHAT COURT WOULD ORDER DONE.** A trustee may do, without a decree or order of court, that which the court would order or decree him to do on a showing made.
2. **Trusts: POWER OF TRUSTEE TO SETTLE CLAIM BEFORE IT BECOMES A LIEN.** In order to obviate costs and expense, the trustee may dispense with all matters of form or procedure and settle a claim which is about to be made a lien upon the trust estate before it is judicially established as such.
3. **Mortgage Foreclosure: TRUSTS: NOTE AND MORTGAGE GIVEN BY TRUSTEE: DEFICIENCY AGAINST TRUST ESTATE.** Where the trustee gave a note, secured by mortgage on a portion of the trust property, in settlement of such a claim, promising that the note should be paid in full, and suit to foreclose such mortgage was begun prior to the act of 1897, the trust estate may be held for any deficiency accruing on sale of the mortgaged property.

Stitzer v. Whittaker.

4. **Trusts: NOTE AND MORTGAGE OF TRUSTEE GIVEN TO SETTLE JUDGMENT AND PREVENT COST AND EXPENSE: CONSIDERATION: AUTHORITY OF TRUSTEE.** A creditor of the settlor of a trust prior to its creation afterwards obtained three judgments against him. Creditor's suit was brought on one and proceeded to decree. The trustee paid the amount of the decree, but when such decree was satisfied, the two judgments not set up in the suit were entered of record as merged therein and satisfied. Afterwards, to prevent further proceedings, cost and expense, the trustee gave a note and mortgage in settlement of the judgment remaining unsatisfied of record, which did not exceed the amount still actually due the creditor. *Held*, That there was sufficient consideration therefor and that such course on the part of the trustee was proper and within his authority.

APPEAL from the district court for Merrick county.
Tried below before GRIMISON, J. *Reversed with directions.*

J. W. Sparks, for appellant.

W. R. Watson and *W. H. C. Rice*, *contra*.

POUND, C.

The transactions involved in this cause are so confused and the several records in evidence are so unintelligently copied in the bill of exceptions that we have found it difficult to reach a conclusion. As we understand them, the facts of the case are, in substance, these: Prior to 1891, the plaintiff, Stitzer, had sold a building to one Morgan L. Wright, and had taken three notes in payment. On April 1, 1891, said Wright conveyed all his real property to the defendant, Whittaker, as trustee for Wright's four minor children. On April 6, 1892, Stitzer recovered a judgment against Wright in county court upon one of the notes, a transcript whereof was duly filed with the clerk of the district court on April 7. He had already recovered two judgments before a justice of the peace on August 18, 1891, upon the other two notes, and had filed a transcript of each judgment in the district court. On May 10, 1892, he began a creditor's suit against Whittaker and the beneficiaries in the deed of trust to set aside said

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conveyance and subject the land to the payment of the judgment obtained in the county court, no mention being made in the pleadings of the other judgments. Stitzer had already levied an execution pursuant to the judgments in justice's court upon certain personal property claimed by one Katharine Vaughn, and Vaughn seems to have brought an action of replevin to recover the property levied on, in which action the administrator of Margaret T. Wright, deceased, wife of Morgan L. Wright, intervened and successfully claimed the property. This cause was taken to the supreme court where the judgment was affirmed. *Vaughn v. Crites*, 44 Neb., 812. We infer that the creditor's suit was brought while the action of replevin was pending, at a time when it was expected that the judgments in justice's court would be made out of the personal property, and hence was based on the judgment in the county court only. On May 11, 1892, Whittaker, as trustee, petitioned the district court for authority to mortgage the property in order to raise money to pay creditors of the trust estate. This petition was prosecuted to final decree and leave was granted as prayed for on February 14, 1893. The decree authorized Whittaker to raise the sum of \$1,484.65 by mortgage upon terms set forth therein for the purpose of paying debts. Nothing was done under this decree for the reason, probably, that at that time it was impossible to raise money by mortgage upon city property. Afterwards on June 6, 1894, final decree was rendered in the creditor's suit finding that the judgment described in the petition was a lien on the property conveyed by the trust deed and ordering that this property be sold to satisfy the judgment unless the same was paid within sixty days. On July 27, 1894, the defendant, Whittaker, paid the amount of said decree and costs into court and the decree was satisfied of record. Instead, however, of satisfying and cancelling of record the judgment of the county court upon which the decree was founded, an entry was made upon the judgment record to the effect that the two judgments in justice's court

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were merged in the decree and satisfied by payment of the amount found due therein and they were discharged accordingly. The judgment rendered by the county court remained of record unsatisfied. On October 5, 1895, Whittaker as trustee executed and delivered to Stitzer his note for \$311.75, and in order to secure said note executed and delivered a mortgage upon a portion of the property named in the trust deed. The mortgage recites the decree of February 14, 1893, authorizing Whittaker to mortgage the property to pay debts, and that said sum due Stitzer is a debt for which the estate is liable, and also contains a recital that it is necessary in the judgment of the trustee "to mortgage the above described real estate, the same forming a part of said trust estate, in order to prevent the said estate from being sacrificed at forced judicial sale." The note remaining unpaid at maturity, suit was brought to foreclose the mortgage, decree of foreclosure was duly rendered therein, the property sold and the sale confirmed. A deficiency remained after applying the proceeds upon the decree and motion was made for deficiency judgment. On account of the confused state of the records and the difficulties involved in passing upon the application, the district court very properly denied the motion but gave the plaintiff leave to bring an action for the deficiency. This action was brought accordingly. In his petition the plaintiff alleges the recovery of the judgment in the county court on April 6, 1892, the filing of the transcript and return of execution unsatisfied, the execution of the trust deed by Wright at the time when he was indebted upon the notes which form the basis of said judgment, the institution of the creditor's suit, the petition by Whittaker for leave to mortgage the trust property to pay debts and the decree accordingly, the execution of the note and mortgage above described, the decree of foreclosure, sale and confirmation, and the deficiency accruing thereon. It is alleged that the note and mortgage were executed pursuant to the decree of February 14, 1893, authorizing Whittaker to mortgage the trust property to pay debts.

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No debt or claim, however, is alleged in the petition other than the judgment recovered in the county court. The defendants answer, admitting the execution of the trust deed, admitting the recovery of the judgment by Stitzer on April 6, 1892, filing of transcript, issuance and return of execution thereon, admitting the creditor's suit, the petition of the trustee for leave to mortgage and the decree thereon, and the execution of the note and mortgage to Stitzer. They allege that Stitzer accepted the mortgage in full satisfaction of the judgment set forth in the petition, interest and costs, that his claim was fully paid by Whittaker as trustee on July 27, 1894, and that there was no authority or consideration for the execution of the mortgage. The court found generally for the defendants and this appeal is prosecuted from a decree pursuant to such finding.

It will be seen that the pleadings in this case, the entries on the judgment records, the record in the creditor's suit and the recitals of the mortgage executed by Whittaker are very much at variance with one another. The plaintiff's petition indicates and the answers seem fairly to admit that the mortgage was given in settlement of the judgment rendered in the county court. That judgment remained on record unsatisfied in October, 1895, when the note and mortgage were executed, and was canceled of record immediately thereafter. On the other hand the decree in the creditor's suit, which suit, as the pleadings therein clearly disclose, was based solely upon the county court judgment, had been satisfied almost a year previously in July, 1894. It is obvious that Stitzer would not have taken a mortgage on part of the trust estate for \$311 in lieu of a lien upon the whole for \$330 already in judgment and immediately enforceable, and it is equally clear that Whittaker did not intend to pay one claim twice. The mortgage recites that it was made to avoid forced judicial sale, and Whittaker expressly testifies that he gave the note to prevent another such proceeding as the one resulting in the judgment he had paid and satisfied.

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The county court judgment did not amount, as a computation will show, to the sum found due in the decree in the creditor's suit, but did amount to the sum put in the note and secured by the mortgage. On the other hand the judgments in justice's court amounted at the time of the decree in the creditor's suit to but a trifle more than the amount found due therein. The only explanation is that the parties in some way became confused as to the basis of the creditor's suit and in endeavoring to settle the matter without expense reckoned the amounts due on the justice's judgments, placed that amount in the decree in the creditor's suit, and caused the entries to be made merging those judgments in that decree and satisfying them by payment thereof. This left the judgment in the county court still unsatisfied and the parties seem to have supposed that by giving the note and mortgage they were settling that judgment in order to prevent another creditor's suit and further expensive proceedings. There were two claims, one on the judgments in justice's court, and the other on the judgment in county court, and it is very clear from Whittaker's own testimony that he intended to pay one and settle the other. Stitzer testifies Whittaker told him that in the then condition of the estate he did not like to have the remaining claim go as the other had gone on account of the low prices of property, and that he would like to give security and obtain more time in which to raise the money and pay the claim. Whittaker testifies that when he gave the mortgage Stitzer claimed he had a lien against the estate which was still unpaid; that he intended to pay one claim and settle one, but does not know what the claims were composed of nor which was settled and which paid.

The case seems to have been decided upon the theory that unless the judgment rendered by the county court was the consideration of the note and mortgage, plaintiff's claim must fail. If such were the case we should be disposed to agree with the conclusion of the trial court. The parties probably understood that they were settling

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that judgment and intended the note and mortgage to cover the amount thereof and satisfy the judgment still remaining of record. The fact that the entry on the judgment record discharging the judgment in the county court bears the same date as the mortgage, taken in connection with the recitals of the instrument itself, makes this very plain. But that judgment was the basis of the decree in the creditor's suit and in strictness had already been settled by satisfaction of such decree. We cannot think, however, that the plaintiff ought to be deprived of the moneys justly due him because of the confusion which has attended the attempts to satisfy these three judgments. The parties intended to settle them all, and so long as they so intended and there were valid and subsisting judgments to settle, we cannot see how any rights were lost by the mistake in identifying the judgment which was merged in the decree in the creditor's suit. So long as an indebtedness remained for which the trust estate was liable there was ample consideration for a note and mortgage not exceeding that amount. Defendants have the burden of proving that there was no consideration, and have not sustained it.

It is claimed on behalf of appellees that the trustee had no power or authority to give a mortgage for the satisfaction of the judgments rendered in justice's court because executions had not been issued and returned unsatisfied upon those judgments, nor had they been adjudged liens upon the trust property in a creditor's suit. But we do not think that was necessary under the circumstances of this case. It had already been adjudged in one creditor's suit that the conveyance to the trustee was voidable as to Stitzer's claims. There could be no reason to think that another creditor's suit could result otherwise than in another decree for sale of the trust property. On a previous occasion, the court had granted leave to mortgage for payment of claims against the property. The proper course was for the trustee to settle the matter with as little expense as possible. He testifies ex-

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pressly, and it is recited in the mortgage, that his purpose was to prevent forced sale of the property at suit of creditors. A trustee has a reasonable discretion in cases of this kind. It is well settled that he may do that without a decree or order of court which the court would order or decree him to do on a showing made. 2 Perry, Trusts, section 476; 2 Beach, Trusts and Trustees, section 428. Whether or not the decree rendered two years before on Whittaker's petition was sufficient authority for this mortgage we need not decide, because we feel satisfied that it was entirely proper for him to avoid the costs and expense of a suit to enforce payment of a judgment still unsatisfied, by giving the note and mortgage in satisfaction thereof. Such course was obviously for the best interests of his trust, and any court of equity would have authorized it on proper showing and will ratify it after it has been done. "Trustees may waive all matters of mere form which saved circuitry, trouble, and expense." 2 Perry, Trusts, section 476. In *Bath v. Bradford*, 2 Ves. Sr. [Eng.], 590, Lord Hardwicke said: "One thing is plain; that all these creditors might have joined in a bill for satisfaction of their debts; * * * Then the court must have decreed for the raising, by mortgage probably as this is a great estate * * * and the moment that mortgage was made, the money, it is clear, must have carried interest. Then how is the defendant Mr. Newport or his estate prejudiced by what has been done? It has prevented the sale or mortgage of that estate, and saved the expense of all those separate bills. * * * It was objected, that though the court would certainly upon bills brought by the creditors have decreed by raising the money by mortgage or sale, yet the trustees could not have done it by joining with the person who had this particular chattel interest. But I am of opinion that the trustees might; for they are not to wait for a decree of this court for the raising the money; which would oblige every person to come here; whereas, they might do it without that, and therefore it has been common for trustees to do it

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fairly by sale or mortgage, and this court, if it came before them afterward, has always supported it."

There is no evidence to show that the mortgage was taken in full satisfaction of Stitzer's claim. He testifies expressly that he entered into the settlement relying on the trustee's promise that it would be paid in full, and of course the burden is upon the defendants to maintain their allegation that the mortgage was accepted in complete settlement. It is asserted, however, that a trustee has no power to obligate the trust estate by promissory note and therefore that the estate cannot be liable for a deficiency, since judgment therefor may be rendered only where there is a liability at law. It is undoubtedly the rule at law that trustees cannot bind the estates they have in charge by any note which they attempt to issue in their representative capacity. The law knows nothing of the *cestui que trust* and holds the trustee personally liable on any note or bill he executes, even though he stipulates in the paper that he is acting as trustee. *Forster v. Fuller*, 6 Mass., 58; *Conner v. Clark*, 12 Cal., 168; *Hills v. Banister*, 8 Cow. [N. Y.], 32. But although the trustee was personally liable at law, even where the consideration accrued to the estate, he could claim reimbursement in his accounts and be allowed the amount for which he had been held. *Pooler v. Wilkinson*, 42 Ga., 539. Instead of pursuing the trustee at law, however, the holder of the instrument might proceed in equity to subject the trust estate to the payment of the claim for which it was liable. 2 Perry, Trusts, section 874; 22 Ency. Pl. & Pr., 176. It is manifest that the objection urged by the appellee is founded on difficulties arising out of the old separation of law and equity jurisdiction. Under the Code where the court has the power to administer legal and equitable relief in the same action, it can make very little difference whether the trustee is held personally and then permitted to reimburse himself out of the trust estate or the proceeding is held analogous to the suit in equity to enforce the claim against the estate directly. Accordingly in *Gaudy v. Babbitt*, 56

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Ga., 640, the court says very aptly: "On principle, it is difficult to say why a trustee who can contract a debt at all, can not do so by note. Why should there be a capacity to make a verbal promise and not a written one?" But we need not go into that question because it seems clear that this suit, to which the beneficiaries are made parties and in which they have appeared and answered, may be treated as a suit in equity to enforce the claim against the trust estate; and even if we held the deficiency could be recovered only where an action would be maintainable at law, as the trustee could be held personally and could thereafter reimburse himself from the trust estate with the approval of a court of equity, the courts of this state which administer both law and equity in one action need not resort to any circuitous proceeding but can attain the result which would be inevitable on either theory by directing that the deficiency upon the note be paid by the trustee out of the funds of the trust in his hands. We do not think it material to decide whether the note and mortgage were given in settlement of the judgments in justice's court or of the judgment rendered by the county court. The parties intended to settle both. After the amount found due in the creditor's suit had been paid and applied erroneously upon one, the other remained due. If that error had been rectified and the money applied where it should have been, the judgments in justice's court would still have remained due. The parties made application of payments in such way as to leave the county court judgment unsatisfied and undertook to settle that judgment. The estate was liable for it and it was only a question of time and expense until it could be forced to pay.

We recommend that the judgment be reversed and the cause remanded with directions to enter a judgment against the defendant, Whittaker, as trustee, for the amount claimed.

BARNES and OLDHAM, CC., concur.

Reversed and remanded with directions to enter a judg-

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ment against the defendant, Whittaker, as trustee, for the amount claimed.

REVERSED WITH DIRECTIONS.

CHARLES BROADWAY ROUSS V. JACOB GOLDGRABER.

FILED SEPTEMBER 18, 1902. No. 11,834.

91 NW 712
Commissioner's opinion. Department No. 2.

Evidence: PAROL, TO VARY A WRITTEN RECEIPT: CONTRACTS. Where neither fraud nor mistake is alleged, parol evidence to contradict or vary a written receipt must be clear and unequivocal.

ERROR from the district court for Lancaster county. Tried below before CORNISH, J. *Reversed.*

Mockett & Polk, for plaintiff in error.

W. T. Stevens, contra.

POUND, C.

Goldgraber sued Rouss on three causes of action, for commissions on the sale of a stock of goods, for wages as an employee of the defendant, and for moneys paid out and expended to the use of the defendant at his request. The defendant pleaded, among other things, a written release and discharge whereby plaintiff, in consideration of a sale made by defendant at his request, released defendant "from all claims, accounts and demands" which he had against the latter to that date and acknowledged full satisfaction thereof. If we assume, as did the trial court, that this is a mere receipt, and not a contract, and consequently that it is open to impeachment or variation by parol, still we think the proof by which plaintiff is to sustain the allegations of his reply that the matters sued for were not within the purview of the receipt, as intended by the parties, and that he was to be allowed the items in question notwithstanding, must be clear and

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unequivocal. Jones, Evidence, section 503; 19 Am. & Eng. Ency. Law [1st ed.], 1128. As to the cause of action for commissions, plaintiff's testimony is clear and express that he was to be paid such claim notwithstanding the release. But the trial court took this cause of action from the jury, by an instruction, upon other grounds. As to the remaining claims, we find nothing of a satisfactory nature in the evidence. The most that plaintiff says is that he did not mention these claims at the time. But this is in no way inconsistent with an intention to give up all claims of every nature, as the written release provided. He does not pretend that he did not know of these items. On the contrary, the circumstances were such that he must have known of them, if the claims are well founded, and there is much to make it appear that defendant insisted upon the paper for the very purpose of preventing the assertion of any such claims after the transaction was closed. The other witnesses to whose testimony counsel refer us, testify only with reference to the claim for commissions. We are not able to find anything of sufficient clearness or definiteness to warrant a verdict contrary to the written release.

It is recommended that the judgment be reversed and the cause remanded for a new trial.

BARNES and OLDHAM, CC., concur.

REVERSED, AND REMANDED.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
v. MOSES ROBERTS.

FILED SEPTEMBER 18, 1902. No. 11,933.

91 NOV 7 1902
Commissioner's opinion. Department No. 2.

1. Railroads: PERSONAL INJURIES: DAMAGES. A railroad company is not liable for injuries due to horses taking fright at the ordinary operation of a hand-car.

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2. **Railroads: HIGHWAYS: DEGREE OF CARE.** The same degree of care is required of a railroad company operating its road across a public highway and of persons using the highway; each is bound to use such care in order to avoid accidents as is commensurate with the danger involved under the circumstances of the particular crossing.
3. **Railroads: CROSSING HIGHWAYS: RIGHT OF WAY.** While the rights of the railroad company and of persons using the highway at the crossing are equal, the railroad company has the superior right of passage; and, if otherwise exercising due care, it commits no wrong in running its cars across the highway in front of approaching teams.
4. **Railroads: CARS ON SIDE-TRACK NEAR CROSSING: DEGREE OF CARE.** If a railroad company, in the ordinary conduct of its business, leaves a row of freight cars upon a side-track at right angles to a public crossing, so as to partially obstruct the view of persons passing over it, such fact of itself does not render the company liable for accidents occurring at the crossing, but merely imposes a duty of greater care both upon the company and upon those who use the highway.
5. **Railroads: LEAVING CARS ON HIGHWAY: WHEN NEGLIGENCE.** A railroad company may properly leave its cars standing in the highway at a crossing for short periods when necessary in the reasonable conduct of its business. But to leave such cars in or upon the highway longer than is needful for such purpose is negligence.
6. **Railroads: LEAVING CARS ON HIGHWAY: NEGLIGENCE PROXIMATE CAUSE OF INJURY: LIABILITY.** In order to hold a railroad company liable for an injury received at a crossing where cars were suffered to stand upon the highway longer than necessary in the reasonable conduct of the company's business, it must appear that the negligence in so leaving them was the proximate cause of the injury.

ERROR from the district court for Johnson county.
Tried below before STUBBS, J. *Reversed.*

J. W. Deweese and Frank E. Bishop, for plaintiff in error.

L. C. Chapman and George A. Adams, contra.

POUND, C.

Graf is a small station on the line of the Burlington railroad company, which was defendant below and is

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plaintiff in this court. The track at that point runs east and west. The village and station are on the north side of the main track. There is a side-track to the south. Just east of the station a public highway crosses the tracks, which, according to the testimony adduced by the plaintiff, are twelve feet apart at that point. North of the tracks this road becomes the main street of the village. The Central Elevator Co. has its scales and office building eight feet south of the side-track and some 34 feet east of the crossing. Its elevator is still further to the east on the same side of the track. The wagon road from this elevator and its scales runs parallel with the side-track about 30 feet distant and turns into the road very close to the crossing of the side-track, necessitating a somewhat sharp turn at that point. The crossing is higher than the road, and at the point where the road from the elevator turns in there is a slight ascent. On the same side of the track, 215 feet west from the crossing, there is another elevator, known as the Duff elevator. On August 30, 1898, a number of freight cars were standing on the side-track west of the crossing between the crossing and the Duff elevator. According to the testimony of plaintiff and his witnesses, the car nearest the crossing was within five or ten feet of the planks. The car farthest distant was near the elevator. Plaintiff did not count them, but estimates from his general recollection that there were twelve or fourteen in all. The records of the station, however, show clearly that there were five only, and this agrees with the distances and the evidence as to where the cars were placed. Late in the afternoon of that day, plaintiff was at the scales east of the crossing with a team and a lumber wagon, and had been weighing a load of coal. He then drove toward the crossing intending to take the road north across the tracks. As has been seen, his course lay close to and parallel with the tracks, and his view of the main track for some 200 feet west of the crossing was cut off by the cars, nor could he see between them because he was going toward the end of the car nearest him, not

at right angles to the row. When he was about to start, he heard a noise which he supposed was due to a windmill and seems to have given no more attention. He had been about the crossing for several hours and knew exactly how the land lay and how far his view was obstructed by the standing cars. Nevertheless, starting close to the track, with no way of seeing the main track beyond the elevator,—as he could have done had he come down the public road from the south,—he took no further precaution than inquiring as to the noise and learning that no train was due. He drove to the crossing, turned into the main road, and was about to cross at what he calls “pretty fair speed.” At this point a hand-car operated by four laborers in the employ of the company came down from the west on the main track, ran in front of the team, and frightened them so that they turned sharply and ran away, breaking the wagon and injuring the plaintiff. The hand-car was running slowly as it approached the crossing, probably not more than five miles an hour, and was stopped promptly as soon as it was seen that the horses were frightened, not going more than twenty feet according to one witness or fifty feet according to another. Upon this evidence, a jury found for the plaintiff, and a judgment was rendered accordingly from which error is prosecuted.

We are of opinion that the verdict and judgment ought not to stand. The plaintiff pleads and the evidence shows that the accident was due to his horses becoming frightened at the hand-car. But this, of itself, would not make the defendant liable. The ordinary operation of a hand-car is one of the incidents of a railroad, and horses must become used to such appliances as to the many others with which modern highways abound. In this era of bicycles, automobiles, trolley cars, traction engines, and steam fire engines, we can not take the nerves of the horse as the measure of rights in the highway. Unless there is something so unusual and out of the ordinary about an appliance of this sort that in the proper and reasonable use of public thoroughfares it has no place on roads

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frequented by teams, no liability arises from its ordinary operation, even though horses are frightened. *Holland v. Bartch*, 120 Ind., 46, 22 N. E. Rep., 83; *Thompson v. Dodge*, 58 Minn., 555, 60 N. W. Rep., 545; *Piollet v. Simmers*, 106 Pa. St., 95; *Yingst v. Lebanon & A. Street R. Co.*, 167 Pa. St., 438, 31 Atl. Rep., 687; *Patnoude v. New York, N. H. & H. R. Co.*, 61 N. E. Rep. [Mass.], 813; *Gilbert v. Flint & P. M. R. Co.*, 51 Mich., 488, 16 N. W. Rep., 868; *Macomber v. Nichols*, 34 Mich., 212. See also *Atchison & N. R. Co. v. Loree*, 4 Neb., 446. Hence plaintiff must show not only that his horses were frightened by the hand-car, but that their fright was caused by some negligence of the company or its servants and not by the ordinary operation of the car. The same degree of care is required of a railroad company operating a road across a public highway and of persons using the highway. Each is bound to use such care in order to avoid accidents as is commensurate with the danger involved under the circumstances of the particular crossing. *Texas & P. R. Co. v. Cody*, 166 U. S., 606, 615; *Omaha & R. V. R. Co. v. Talbot*, 48 Neb., 627, 635. No doubt the rights of the railroad company and of persons using the highway at the crossing are equal. Nevertheless, for obvious reasons growing out of the necessary mode of operating a railroad and of public convenience, the railroad company has the superior right of passage. It can not in the nature of things be asked to stop its trains or even its hand-cars to let persons using the highway at a crossing drive over ahead of them. *Continental Improvement Co. v. Stead*, 95 U. S., 161; *Black v. The Burlington & M. R. R. Co.*, 38 Ia., 515; *Newhard v. Pennsylvania R. Co.*, 153 Pa. St., 417; *Morris v. Chicago, M. & St. P. R. Co.*, 26 Fed. Rep., 22. In consequence, if otherwise exercising due care, it commits no wrong in running its cars across the highway in front of approaching teams. We are unable to perceive in what way the laborers upon the hand-car were negligent in its operation. They were going very slowly and seem to have had the car under good control. No signal could

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have been given by whistle or bell because no such appliances are provided for nor feasible upon a hand-car. The statute requires them upon engines only. As the car went slowly and was easily stopped, the noise it made gave ample warning of its approach, and if plaintiff had investigated the noise he heard instead of taking a wrong explanation for granted, he could have turned his horses so they would not have been frightened. The cars were left upon the side-track in the ordinary course of the company's business in order to fill them at the elevator. The fact that they partially obstructed the view of persons passing over the crossing does not of itself render the company liable for accidents occurring there, but merely imposed a duty of greater care both upon the company and upon those who use the highway. *Chicago, R. I. & P. R. Co. v. Williams*, 56 Kan., 333, 43 Pac. Rep., 246; *Chicago & A. R. Co. v. Nelson*, 59 Ill. App., 308; *Haas v. Grand Rapids & I. R. Co.*, 47 Mich., 401, 11 N. W. Rep., 216; *Continental Improvement Co. v. Stead*, 95 U. S., 161. Nor is it material that one of the cars may have projected over the line of the highway, though not upon the traveled road. No doubt the public are entitled to the full width of the highway as established. While a railroad company may properly leave its cars standing in the highway at a crossing for short periods, when necessary in the reasonable conduct of its business, to leave such cars in or upon the highway longer than is needful for such purpose is negligence. *Great Western R. Co. v. The City of Decatur*, 33 Ill., 381. But this circumstance, of itself, would not suffice to make the company responsible for all mishaps taking place at the crossing. In order to hold the company it must appear that the negligence in leaving the car in the public road was the proximate cause of the injury. *Omaha & R. V. R. Co. v. Talbot*, 48 Neb., 627. Such was not the case here. The cause of the accident was the horses taking fright at the proper operation of a hand-car passing in front of them. A few feet more of clear space at the side of the traveled crossing would not

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have prevented this, since it would not have sufficed to make the approaching hand-car visible by the plaintiff, in the manner in which he went upon the crossing, at an appreciably greater distance. In *Sellick v. Lake Shore & M. S. R. Co.*, 93 Mich., 375, 53 N. W. Rep., 556, which goes as far as any case we have found, a freight train obstructed an entire crossing for over twenty minutes, contrary to a statute. While plaintiff, who had been detained wrongfully at the crossing over ten minutes, was waiting for the train to move so that he could proceed, another train came by rapidly on a track beyond and exhausted large quantities of steam. Under such circumstances, it might well be said that the obstruction of a crossing where trains were passing, so as to keep persons using the highway waiting in proximity to such passing trains so long a time without opportunity to observe their approach and take measures to prevent horses from taking fright, was the proximate cause of the injury. The case at bar is quite different. The plaintiff admits that one of the horses had run away on a prior occasion. This circumstance and the well-known fact that all horses are liable to take fright at objects moving in front of them sufficiently explain an unfortunate accident for which we are unable to see that the defendant has been shown to be liable.

It is recommended that the judgment be reversed and the cause remanded for a new trial.

BARNES, C., concurs.

REVERSED AND REMANDED.

OLDHAM, C., concurring.

I concur generally in every proposition discussed by my learned associate in this opinion, but as all evidence possible for the plaintiff to procure tending to show actionable negligence on the part of the railroad appears to have been produced at the trial in the court below I see no good reason for remanding this cause. I think the petition should be dismissed and further litigation over the matter should be stopped.

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EDGAR E. HOOD, TRUSTEE IN BANKRUPTCY IN THE MATTER OF JAMES H. STEWART, BANKRUPT V. THE BLAIR STATE BANK ET AL.

FILED SEPTEMBER 18, 1902. No. 12,028.

Commissioner's opinion. Department No. 2.

1. **Creditors' Suit: TRUSTEE IN BANKRUPTCY MAY MAINTAIN: FRAUDULENT CONVEYANCES: NECESSITY OF JUDGMENT.** A trustee in bankruptcy, acting for the creditors of the bankrupt, may maintain an action in the nature of a creditors' bill to set aside a fraudulent conveyance without reducing the claims of the creditors to judgment. In all other things he possesses only such rights and powers as they can exercise for themselves.
2. **Creditors' Suit to Set Aside Fraudulent Conveyances: RIGHT OF TRUSTEE IN BANKRUPTCY TO MAINTAIN IF INSOLVENCY PROCEEDINGS PENDING.** Where it is shown in the petition of such trustee that insolvency proceedings are pending under the state insolvency law, providing for an assignment for the benefit of creditors, his action to set aside alleged fraudulent conveyances and a decree of the state court foreclosing them, cannot be maintained.
3. **Bankruptcy: EFFECT OF ACT ON INSOLVENCY PROCEEDINGS UNDER STATE LAW.** The bankruptcy act of 1898 does not affect proceedings commenced under the state insolvency law before its passage.

ERROR from the district court for Washington county.
Tried below before BAXTER, J. *Affirmed.*

Kennedy & Learned, Walton & Mummert and F. S. Howell, for plaintiff in error.

Francis A. Brogan and Herman Aye, contra.

BARNES, C.

On the 15th day of July, 1899, Edgar E. Hood, as trustee in bankruptcy, filed a petition in the district court of Washington county against the Blair State Bank, Grant Stewart, James H. Stewart, Anna Stewart, wife of James H. Stewart, and I. C. Eller as assignee of James H. Stewart, to set aside a decree of the district court of Washington county foreclosing a certain real estate mortgage,

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and the title to the said real estate obtained thereunder. A demurrer was filed to the petition, which was sustained. Afterwards the petition was amended by leave of the court, and to this amended petition a demurrer was filed, which was also sustained by the court. Thereupon the plaintiff asked and obtained leave to file an amended and substituted petition. And on the 23d day of April, 1900, he filed the said petition, and alleged therein in substance, that on the 24th day of April, 1899, in the district court of the United States within and for the third district of the territory of Oklahoma a petition, in involuntary bankruptcy, was filed against James H. Stewart; that on said day the court having obtained jurisdiction over the person of the said Stewart, did adjudge him a bankrupt, which judgment has since remained, and is now, in full force and effect; that E. E. Hennessey was, on said date, since has been, and now is, the 'duly appointed, qualified and acting referee in bankruptcy in said judicial district, and to such referee the matter of the bankruptcy of the said James H. Stewart was duly referred and submitted; that claims have been filed with said referee in bankruptcy by the creditors of said bankrupt, aggregating about \$22,000, which said claims have been allowed; that they were created and contracted by the said Stewart subsequent to the execution of the instruments described in the petition, and that they were contracted on the faith and credit of James H. Stewart, and in reliance on the condition of his property situated in Washington county, Nebraska, as shown by the records of said county; that subsequent to said adjudication in bankruptcy the creditors of James H. Stewart elected the plaintiff trustee; that he was, and is, the duly elected, qualified and acting trustee in bankruptcy in the matter aforesaid, and as such trustee prosecutes this action by order of the referee, and of the district court aforesaid, for the benefit of the creditors of said bankrupt; that the Blair State Bank is now, and at all times mentioned herein was, a corporation organized and existing under and by virtue of the laws of

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the state of Nebraska for the purpose of carrying on a general banking business, with its principal place of business in the city of Blair, Washington county, Nebraska; that Truman E. Stephens was the cashier of said bank, and its general managing officer; that the defendant, Anna Stewart, was, at all times mentioned in the petition, and now is, the wife of James H. Stewart; that on the — day of —, 1895, the defendant, I. C. Eller, was duly elected and qualified, and thereafter acted as the assignee of James H. Stewart under an assignment by the said James H. Stewart for the benefit of his creditors; that during the times mentioned in the petition up to and including July 30, 1895, James H. Stewart was a resident of Blair, Washington county, Nebraska, and was engaged in the general hardware business in said city; was the owner of a general stock of hardware and merchandise located in his store building on lots one and two, and the north twenty-five feet of lots twenty-nine and thirty in block forty-six, in the city of Blair, Washington county, Nebraska; that he was also, during that period, the owner of certain book accounts due and owing to him from his various customers for hardware and merchandise purchased from him in the ordinary course of business; that said stock of hardware and merchandise, together with the furniture and fixtures, were, during said period, of the value of \$8,000; that said book accounts were of the value of about \$2,000. That during all the times hereinafter mentioned, up to and including the 30th day of July, 1895, said James H. Stewart was the owner of the undivided one-half of lots one and two, and the north twenty-five feet of lots twenty-nine and thirty in block forty-six, in the city of Blair, Washington county, Nebraska, together with the appurtenances thereunto belonging, as appeared by the records of said county; that said Stewart had no property of any kind or character subject to the payment of his debts on the 27th day of October, 1894, or at any time thereafter, except the said stock of hardware and merchandise, furniture, fixtures and book accounts, and

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real estate above described, all of which stood in his name clear of incumbrance on October 27, 1894; that on the 27th day of October, aforesaid, said James H. Stewart was wholly and hopelessly insolvent, unable to meet his obligations and at all times thereafter continued to be insolvent, which was well known to the defendant, the Blair State Bank, and its officers. That on the 27th day of October, 1894, defendant James H. Stewart and Anna Stewart, his wife, executed and delivered to the Blair State Bank a mortgage deed covering and conveying to the said defendant the real estate above described, which mortgage was given for the alleged purpose of securing to said bank the payment of a promissory note for \$3,150, dated October 27, 1894, signed by James H. Stewart, payable to the defendant, the Blair State Bank, six months after date; that on the 27th day of October, 1894, the defendant, Grant Stewart, was liable as surety on certain negotiable paper of the said James H. Stewart alleged to be held by the defendant bank, due six months after date, which said negotiable paper was of the amount of \$6,850 or more; that for the alleged purpose of securing the said Grant Stewart against loss on said paper said James H. Stewart and Anna Stewart, on said day, executed to Grant Stewart a mortgage deed covering and conveying said real estate, which mortgage was intended by said James H. Stewart and wife to be subject and subsequent to the mortgage executed by them on said same day to the defendant bank. Except as in this paragraph stated there was no consideration for said mortgage to Grant Stewart; the same was not requested by him, and he had at the time of the execution of said mortgage to him, and for some considerable time thereafter, no knowledge whatever of its execution, and said mortgage was not delivered to said Grant Stewart, and the execution thereof was purely voluntary on the part of said James H. Stewart and his said wife. That on the 10th day of April, 1895, James H. Stewart executed and delivered to the Blair State Bank a certain bill of sale, an instrument in writing, purporting to

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convey to the said bank the stock of hardware and merchandise, furniture, fixtures and book accounts above mentioned, for the alleged purpose of securing a certain promissory note of even date therewith, executed by said James H. Stewart to the bank in the sum of \$7,500, due thirty days after date; that on the 6th day of July, 1895, said James H. Stewart executed and delivered to the said Blair State Bank a certain bill of sale, an instrument in writing, purporting to convey to said defendant all of said stock of hardware, merchandise, furniture and fixtures, and book accounts, for the alleged purpose of securing a certain promissory note of even date made by said James H. Stewart to said bank in the sum of \$7,500, due on demand; that on the 27th day of October, 1894, and subsequent thereto, the value of the interest of the defendants, James H. Stewart and Anna Stewart, his wife, in and to the real estate above described, was about \$10,000; that neither the Blair State Bank nor the said Grant Stewart took possession of any part or parcel of said real estate, or personal property belonging to said James H. Stewart prior to the 30th day of July, 1895, and no one of said mortgages or bills of sale was filed for record or recorded in Washington county, Nebraska, prior to said date; that none of the creditors of the said James H. Stewart whose claims have been allowed in said bankruptcy proceedings had any knowledge or notice of the execution or existence of said mortgages or bills of sale until the date of the record thereof, July 30 and 31, 1895; that at the time of the execution of said mortgage and bills of sale to the defendant bank, the said James H. Stewart was not indebted to said defendant in the aggregate amount of the several sums expressed in said instruments as consideration therefor; but said mortgage and bills of sale were executed for an aggregate amount in excess of the amount due from said James H. Stewart to said bank by many thousand dollars; that at the time of the execution of said real estate mortgages, October 27, 1894, and at the time of the execution of each of the bills of sale above men-

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tioned, it was agreed by and between the defendant bank acting for itself and pretending to act for Grant Stewart on one part and James H. Stewart on the other part, that the mortgages and bills of sale should be withheld from the records of Washington county until such time as James H. Stewart might be obliged to fail in business, and in the meantime the property should remain in the possession of James H. Stewart, with power in him to sell the personal property in the usual course of trade and apply the proceeds to his own use; and it was agreed that if said James H. Stewart should fail in business and close up his store he would then deliver said real and personal property into the possession of the defendant bank, and said instruments were then to be recorded. At the time of the execution of said mortgages and bills of sale James H. Stewart was transacting his hardware business in the usual way, and so continued to transact his business until July 30, 1895, when he failed in business, closed up his store, delivered the same into the possession of the defendant bank and never again reopened said store or business, all as previously agreed between the parties aforesaid. That during said time it seemed to the public and to his creditors, that James H. Stewart was conducting a safe and profitable business; that he had good standing and credit in the community in which he lived and did business, and in the commercial world. It was alleged that the object of the agreement between defendant bank and Stewart to withhold the mortgages and bills of sale as stated and understood between them, and in leaving Stewart in possession of the personal property with power to sell the same, was to enable the said Stewart to purchase on credit large quantities of hardware and other merchandise on the faith of his commercial rating and standing in the community; the agreement and intention being that said hardware and merchandise should not be paid for, but should be bought on credit and sold and used by James H. Stewart and defendant bank for their joint benefit and profit. It was understood by and between the

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said parties at the time the instruments were executed that the knowledge of their existence should be carefully concealed from all persons whomsoever, except Grant Stewart, and especially from the creditors of James H. Stewart, and from the various persons and business houses from whom said James H. Stewart was purchasing said property. That pursuant to said agreement such knowledge was carefully concealed from the creditors of James H. Stewart and from the persons and business houses from whom he was purchasing, with the intent and for the purpose of deceiving his creditors and others from whom he was purchasing merchandise, and cause them to believe that he was the owner of the real estate and personal property standing in his name and in his possession, and the same were clear of incumbrances and subject to the payment of his debts; that by virtue of said corrupt agreement, James H. Stewart succeeded in purchasing and procuring from various persons large quantities of hardware and merchandise on credit between October 27, 1894, and July 30, 1895; and that such hardware and merchandise were sold to him relying on the fact that his property appeared to be clear of incumbrance and subject to the payment of his debts; that if the facts relating to the execution of said mortgages and bills of sale had been known to them they would not have sold him hardware or merchandise on credit, and that by reason of the condition of his property as shown by the records of Washington county his creditors refrained from pressing him on his obligations, and in some instances loaned him more money and extended the time of payment of his debts, and failed to collect and make good their accounts, which they might and would have done had the facts in relation to said mortgages and bills of sale been made known to them; that the making of said mortgages and bills of sale were and constituted one continuing transaction, and were executed in pursuance of one corrupt agreement and understanding, and were illegal and fraudulent as against the creditors of James H. Stewart, and were made for the fraud-

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ulent purpose of deceiving and misleading them; that they were misled and deceived by reason of said agreement, and the fraudulent character thereof, to their great loss and damage. Not only was said agreement, so made by and between the parties, illegal and fraudulent as to the creditors of James H. Stewart, but the mortgages and bills of sale, and each of them, were parts and parcels of the fraudulent agreement, and were fraudulent and void as against the creditors of James H. Stewart, who have had their claims allowed in said bankruptcy proceeding. That during the period aforesaid between October 27, 1894, and July 30, 1895, the aggregate amount of the debts of the said James H. Stewart was about \$50,000 and his property and assets aforesaid were of the value of about \$20,000, all of which was well known to the defendant bank, but unknown to his other creditors. That during the period between the 10th of April, 1895, and the 30th of July, 1895, James H. Stewart continued in the absolute possession of the said stock of hardware and merchandise, and property; and during the period he purchased hardware and merchandise in large quantities and continued to sell hardware and merchandise in said store in large quantities in the usual course of retail trade, all in the same manner and to the same extent as before the 10th of April, 1895; that he collected and applied to his own use the proceeds of such sales, and during all of said period said stock of hardware and merchandise was constantly changing in quantity and character; that the stock which was on hand in the store on the 30th of July, 1895, was, to a large extent, a different stock, and different merchandise, than the stock and merchandise on hand April 10, 1895; that during said time James H. Stewart continued to collect from his customers accounts due from them, notwithstanding the fact that said accounts outstanding in his favor were included in said bills of sale executed April 10, and July 6, 1895. That said James H. Stewart retained said moneys and applied them to his own use, all of which transactions were well known to the defend-

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ant bank; that the conduct of said store by said James H. Stewart between April 10, 1895, and July 30, 1895, was a fraud upon his creditors, who have had their claims allowed; that said bills of sale and transactions were illegal, fraudulent and void under the statutes of the state of Nebraska, and were executed for the purpose and intention thereby to give to the defendant bank an undue advantage over other creditors; that the real estate mortgages were filed for record in Washington county, Nebraska, July 30, 1895, and said bills of sale were filed for record in said county July 31, 1895; that prior to the execution of said real estate mortgages, on the 27th of October, 1894, the defendant bank and its officers knew that said James H. Stewart was unreliable and unworthy of credit; that he had forged the name of his brother, E. A. Stewart, to a certain promissory note in the sum of \$14,000 then held by the defendant bank; nevertheless and notwithstanding such knowledge and the knowledge that James H. Stewart was insolvent the defendant bank entered into the agreement with him aforesaid, and that his creditors were without any knowledge or notice of the character of said James H. Stewart, or of his insolvency or his actual financial condition. That the total indebtedness due from said James H. Stewart to the defendant bank has been, and was, fully paid by conveyances of 1,100 acres of land in Washington county, Nebraska, on the 27th day of February, 1897, which said land was conveyed by Grant Stewart to Frederick W. Kenny, Sr., president of said bank, by agreement with said bank, in full payment and satisfaction of said indebtedness. That notwithstanding the fraudulent character of said transactions, mortgages and bills of sale, the defendant bank instituted certain foreclosure proceedings in the district court of Washington county, Nebraska, and pretended to foreclose its said real estate mortgage and purchased at foreclose sale the title to said real estate, which pretended title the defendant bank still holds, notwithstanding the fraudulent character of the said mortgages and

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bills of sale, and the payment of said debt the defendant bank took possession of said stock of hardware and merchandise, furniture and fixtures, and book accounts, so far as the same remained undisposed of and uncollected, July 30, 1895, and under and by virtue of certain pretended foreclosure proceedings instituted in the district court of Washington county, Nebraska, in which the defendant bank alleged that said bills of sale were, in fact, chattel mortgages, converted said stock, furniture, fixtures and book accounts to its own use, to the great loss and damage of the said James H. Stewart; that the pretended foreclosure proceedings and the conversion of said property and the proceeds thereof were a part and parcel of the original agreement and transaction entered into by and between defendant bank and said James H. Stewart, and were a continuation of the fraud perpetrated by them on the creditors of said Stewart; that none of the creditors of James H. Stewart were made parties to the pretended foreclosure proceedings. That the said real estate mortgage was fraudulent and void, that the pretended foreclosure proceedings had thereon were of no force and effect as against the creditors of James H. Stewart, and the defendant bank holds the title to said real estate acquired through said pretended mortgages subject to the claims and demands of the creditors of James H. Stewart, and subject to the rights, claims and demands of the plaintiff. That the real estate mortgage executed by James H. Stewart and wife to Grant Stewart was illegal and fraudulent, and void for the reason that it was executed without consideration, and with no request whatever by Grant Stewart; that it was not delivered to said Grant Stewart, because it was a part and parcel of the corrupt agreement entered into by and between the defendant bank and James H. Stewart, aforesaid; whatever interest the said Grant Stewart or defendant bank may have acquired under and by virtue of the said pretended mortgage was subject to the claims of the creditors of the said James H. Stewart, and subject to the claims and

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rights of the plaintiff; and that whatever interest the bank acquired in and to said property under and by virtue of said pretended mortgage to Grant Stewart, and under and by virtue of the pretended foreclosure of the same, is held by the defendant bank for the use and benefit of the creditors of James H. Stewart, and for the benefit of this plaintiff. That on or about the 30th of July, 1895, the defendant took possession of said real estate, and has ever since retained the same, and has collected the rents and profits thereof to the amount of about \$3,000, and has appropriated the same to its own use and now holds the said rents, issues and profits, claiming the title thereto, under and by virtue of the pretended real estate mortgage, and the pretended foreclosure thereof, and has no other rights thereto. The defendant bank withholds said rents and profits from the plaintiff, under and by virtue of the said corrupt agreement to defraud the creditors of James H. Stewart, as aforesaid. That on or about the 15th day of July, 1899, plaintiff made demand upon the bank for possession of the real estate, and for the rents, issues and profits thereof, and for the personal property covered by the bills of sale and proceeds thereof; defendant refused, and ever since has refused, to deliver such property, or any part thereof, to the plaintiff. That by reason of the concealment practiced upon them the creditors of Stewart did not discover said fraud so practiced upon them until the 30th of July, 1895; that Anna Stewart, wife of James H. Stewart, is made a defendant for the purpose of determining what dower or other interest she has in and to the real estate above described; that I. C. Eller, as assignee of James H. Stewart, is made defendant hereto for the purpose of determining what interest, if any, he has in and to the real estate above described; in this behalf plaintiff alleges that whatever interest he had, or has in said real estate was, and is, subject and inferior to the rights of the plaintiff in said property. The petition concluded with a prayer that the mortgages on the real estate be declared fraudulent and void, that the plaintiff might

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recover of the value of the real estate the amount of said mortgages for the benefit of said creditors of said bankrupt; and that the same be awarded to the plaintiff in his representative and official capacity for distribution in bankruptcy; that the bank be required to account for the sum of \$3,000, or such other sum as they had received as rents, issues and profits of the real estate, and turn the same over to the plaintiff; that the real estate might be sold as upon execution, and out of the proceeds of the sale the plaintiff be awarded the sum of \$10,000 in addition to the sum of \$3,000, rents and profits, and for other general and equitable relief. To this petition the defendant filed the following demurrer (omitting title):

"Comes now the defendant, the Blair State Bank, and demurs separately to the amended and substituted petition of the plaintiff filed herein on the 23d day of April, 1900, upon the ground and for the reasons following:

"1. That the said amended and substituted petition does not state facts sufficient to state a cause of action against the defendant, The Blair State Bank.

"2. That the pretended cause of action attempted to be set up in the said amended and substituted petition appears upon the face of the said amended and substituted petition to have been brought more than four years from the time the same accrued, and to have been barred by the statute of limitations, in so far as the amended and substituted petition states any cause of action not stated in the original petition herein."

Afterwards, on the 18th day of June, 1900, the court being in session, sustained the demurrer to the said amended and substituted petition. The plaintiff elected to stand upon the said petition, refused to further plead, and thereupon the action was dismissed, and from said judgment the plaintiff prosecutes error to this court.

We have epitomized the petition, it being too long to quote in full, but our statement fairly contains the material allegations of it.

1. The plaintiff contends that the court erred in sus-

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taining the demurrer and entering its judgment of dismissal. It is evident that the petition is framed on the theory that a trustee in bankruptcy is endowed with greater rights in favor of the creditors of the bankrupt than they themselves possess. We have carefully examined this question and find that the only thing a trustee can do for the creditors which they can not do for themselves, is to maintain a suit in the nature of a creditors' bill to set aside fraudulent conveyances without having first reduced their claims to judgment. *Southard v. Benner*, 72 N. Y., 424. In other respects the trustee succeeds to the rights and stands in the shoes of the creditors. It is evident that no claim is made in the petition that the conveyances and the decree of the district court complained of, were made or rendered in fraud of the bankrupt act, or the assignment act as found in our statutes. Indeed, such claim could not be made, for more than three years had elapsed after the conveyances were made and recorded and the defendant bank had taken possession of the property in question under them before the passage of the bankruptcy act of 1898, and such act could not have been in the contemplation of the parties when the transactions complained of took place. Neither is it even suggested that the acts of the parties were in contravention of sections 42 and 43, chapter 6 of the Compiled Statutes. It follows then that the petition attacks the conveyances, and the decree of the district court of Washington county, upon the single theory that such conveyances and proceedings were fraudulent and void as to creditors generally. We think that under ordinary circumstances, and if the matters complained of were within the terms of the bankruptcy act, the action could be maintained. We are satisfied, too, that the charge of fraud, as against the immediate parties to the transaction, contained in the petition, is sufficient. But it is stated therein that I. C. Eller is the assignee of James H. Stewart for the benefit of his creditors duly appointed and qualified, and after his appointment and qualification he acted as such assignee.

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It will be observed that there is no allegation in the petition that such assignee has ever completed his work, or performed his duties as such assignee; or that he has ever been discharged, and his right to hold all of the property and assets of the debtor terminated. This being true, if plaintiff should prevail in this action, so far as appears from the petition, the property would all belong and go to the assignee for the benefit of the creditors. There is no authority for a trustee in bankruptcy to prosecute an action for the benefit of the assignee, under insolvency proceedings in the state courts; and there is no reason why he should be permitted to do so, for the assignee, with the consent of a majority in number of the creditors owning two-thirds in amount of all of the claims proven against the estate of the insolvent, is vested with full power to institute and maintain such proceedings himself.

2. It is further alleged in the petition that foreclosure proceedings have been had and completed in the state court; that the real estate in question has been sold, and the title and ownership thereof has been transferred to, and confirmed in the defendant bank. The result of such proceedings will be found in the cases of *The Blair State Bank v. Stewart*, 57 Neb., 58, and *The Blair State Bank v. Stewart*, 57 Neb., 64. The allegations of the petition are not sufficient to establish fraud in the proceedings and decree of the court. It is claimed by the plaintiff that under section 70a of the bankrupt law of 1898, he became at once vested with the title to the real estate in question. Said section is in part as follows: "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt to all (1) documents relating to his property; (2) interest in patents, patent rights, copyrights and trademarks; (3) powers which he might have exercised for his

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own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." If the act was retrospective in its terms, and reached back to the transactions completed more than three years before its passage, still it is apparent by the allegations of the petition itself that James H. Stewart had no title to the real estate as of the time when he was adjudged a bankrupt; he had incumbered and conveyed his title thereto nearly four years before that time, and the incumbrance by the decree of the state court had been foreclosed, his equity of redemption cut off, and the title he once possessed thereto had been transferred and a new and independent title created in another, long before the passage of the act under which the plaintiff claims. Therefore, the title to the real estate in question never vested in the plaintiff as trustee. Again, the bankruptcy act, by its terms, clearly shows that it was not intended to be retrospective in its action; and it may be doubted if this kind of an action can be maintained to set aside transactions had more than three years before its passage. We do not decide this question, however, in this action.

3. By the terms of the bankrupt act itself, it is provided: "Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it." It appearing on the face of the petition that proceedings relating to the matters in question have been commenced, and are presumed to be still pending under the state insolvency laws, before the passage of the bankruptcy act, it follows that they are not affected thereby, and the plaintiff has no power to proceed herein; as appears by the petition, the only one who can maintain this action is the assignee, I. C. Eller, who is made a party defendant herein.

For the foregoing reasons we hold that the court did

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not err in sustaining the demurrer to plaintiff's petition, and we recommend that the judgment of the district court be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

EDGAR E. HOOD, AS TRUSTEE IN BANKRUPTCY IN THE MATTER OF JAMES H. STEWART, BANKRUPT, v. THE BLAIR STATE BANK.

FILED SEPTEMBER 18, 1902. No. 12,029.

Commissioner's opinion. Department No. 2.

Creditors' Suit: FRAUDULENT CONVEYANCES: BANKRUPTCY. The facts herein are the same as in the case of *Hood v. The Blair State Bank*, ante, page 432, and said case is approved and followed.

ERROR from the district court for Washington county. Tried below before BAXTER, J. *Affirmed.*

Kennedy & Learned, Walton & Mummert and F. S. Howell, for plaintiff in error.

Osborne & Aye and F. A. Brogan, contra.

BARNES, C.

This action was commenced in the district court for Washington county by Edgar E. Hood, as trustee in bankruptcy in the matter of James H. Stewart, bankrupt, against The Blair State Bank, to recover the sum of \$10,000, alleged to be the proceeds of a stock of merchandise and certain book accounts conveyed by two bills of sale executed to said bank by James H. Stewart on April 10 and July 6, 1895. The petition is practically a duplicate of the one filed in No. 12,028, just decided by this court and reported ante, page 432. Both actions were commenced at the same time, the same proceedings were had in the trial court and the same judgment was rendered

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in each of them. The only difference between the petitions is, that it is not alleged in the one filed in this case that I. C. Eller is the assignee in the insolvency proceedings pending in the matter of the estate of James H. Stewart, and the said assignee is not made a party to this suit. It is alleged in the petition, however, that the bills of sale were foreclosed in the district court of Washington county, and the proceeds of such foreclosure were paid over to the defendant bank and were thus converted by said bank to its own use and benefit. The petition fails to allege sufficient facts to show that the foreclosure proceedings and the decree of the court therein, were fraudulent and void. It is shown on the face of the petition that the title of James H. Stewart passed to the defendant under the bills of sale more than four years before this action was commenced; and the foreclosure proceedings were had, the property sold and the proceeds were awarded to the defendant about three years before the passage of the bankruptcy law of 1898.

We therefore hold that the plaintiff did not obtain title to said property, or the proceeds thereof, by operation of law, on his appointment as trustee in bankruptcy of the estate of James H. Stewart, and that the demurrer to the petition was properly sustained.

We recommend, as in No. 12,028, that the judgment of the district court be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

ROBERT PAYNE, RECEIVER OF THE KEARNEY NATIONAL
BANK OF KEARNEY, NEBRASKA, v. WILLIAM D. LIEBEE.

FILED OCTOBER 9, 1902. No. 10,613.

Commissioner's opinion. Department No. 1.

1. **Bills and Notes: ACTION BY INDORSEE: DENIAL OF OWNERSHIP: PROOF OF INDORSEMENT.** Where, in an action by the alleged indorsee of a promissory note, the defendant denies the plaintiff's ownership,

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the burden of proof is upon plaintiff to show by competent evidence that the indorsement on the note is that of the payee.

2. **Appeal and Error: FINDING SUPPORTED BY EVIDENCE: FORCE AND EFFECT.** Where the finding of the trial court is supported by sufficient competent evidence, it has the same force and effect as a verdict by a jury, and will not be disturbed unless manifestly wrong.

3. **Bills and Notes: INDORSEMENTS: EVIDENCE.** Evidence examined, and found to sustain the finding and judgment of the trial court.

ERROR from the district court for Buffalo county. Tried below before SULLIVAN, J. *Affirmed.*

Warren Pratt, for plaintiff in error.

J. M. Easterling and *H. M. Sinclair*, *contra.*

KIRKPATRICK, C.

This is an action brought by Robert Payne, plaintiff in error, as receiver of the Kearney National Bank, against William D. Liebee, defendant in error, to recover the sum of eighty dollars with interest alleged to be due upon a promissory note. The action was commenced in justice court, and taken upon appeal to district court, where trial was had, resulting in a finding and judgment for defendant in error, dismissing the action. The petition alleges that plaintiff in error is the duly qualified and acting receiver for the Kearney National Bank; that defendant in error had executed the note, a copy of which is set out, to the bank before the receiver was appointed; that the bank, being indebted to one Emma J. Greer, indorsed and transferred the note in suit to said Emma J. Greer as collateral security long prior to its maturity; that in accordance with the rules adopted by the comptroller of the currency, plaintiff in error brought the suit as receiver for the benefit of Emma J. Greer, the owner of the note. An answer was filed which admitted the appointment of plaintiff in error as receiver, and the execution of the note, and in addition thereto, pleaded as follows: "Defendant further says that at the time he executed the note sued

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on in plaintiff's petition, the Kearney National Bank was indebted to him in the sum of one hundred and twenty dollars for money deposited in said bank, and that said sum is still due and owing from said bank to this plaintiff, and that the note in suit was executed with the agreement that said sum of \$120 was to be applied on said note in full discharge thereof. That the pretended indorsement of the note in suit was not made by authority of the Kearney National Bank, nor for any consideration, but was made by one Chas. Wiley, an employee of said bank and a nephew of Emma J. Greer, without authority and without any consideration." To this answer for reply was filed a general denial.

The facts disclosed by the record are, briefly stated, as follows: On December 12, 1894, the Kearney National Bank closed its doors. At that time it had on deposit belonging to defendant in error \$160, and belonging to Emma J. Greer something like \$4,000. Shortly afterwards the bank desired to resume business, and, for the purpose of satisfying its depositors, issued certificates of deposit, payable in six, twelve, eighteen and twenty-four months. Defendant in error was not willing to accept a certificate of deposit, because, he said, he was obliged to have some money with which to buy feed and seed to put in his crop. To induce him to accept the certificates, the officers of the bank agreed to advance him some money. They accordingly let him have \$100, and took his note therefor. Some time later, when the first certificate of deposit became due for the sum of \$40, defendant in error presented it for payment. The president of the bank said that they were unable to pay him the forty dollars, but that they would let him have half that amount, which they accordingly did, taking up one \$40 certificate of deposit by the payment of the \$20, and by reducing his \$100 note \$20; and defendant in error executed the note in suit for \$80, the president of the bank agreeing when the next certificate of deposit came due, to pay another \$20 on the certificate and reduce the note \$20, and so on until he

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had received enough money on his certificates of deposit to satisfy the note. Before the next certificate of deposit matured, the bank again closed its doors and never reopened.

It is disclosed that Emma J. Greer, at some time before the bank closed the first time, had received an amount of notes as collateral security, and at a later date and just before the bank closed the last time, she seems to have surrendered some of these notes, taking others in lieu thereof, among which was the note sued upon in this action. Emma J. Greer was not called as a witness, and the testimony does not show when she received the note. But Andrews, an officer or clerk in the bank, says she received it just shortly before the bank closed the last time. At the time of the trial there remained due Emma J. Greer, on account of her deposit, between \$1,300 and \$1,400.

The testimony of defendant in error regarding his agreement with the officers of the bank as to the manner in which his note was to be paid is undisputed, and establishes the defense which he pleads to the note. Under the issues as presented by the pleadings the burden of proof was upon plaintiff in error to establish the ownership of the note by Emma J. Greer, and that she obtained it in the usual course of business for a valuable consideration. From a careful examination of the evidence we are satisfied that it fails to establish the ownership of the note in Emma J. Greer so as to make her a holder for value. H. C. Andrews testified that he knew the note was in her possession, that she brought it to him at the bank and he took it for collection. He testified that he did not know when she got it or how she got it, but from his testimony it might be inferred that she got it in exchange for other collateral. The testimony is so meagre and of such an unsatisfactory character, and shows so little knowledge on his part of the matters in question, that we are of opinion that the trial court was justified in holding that the evidence was not sufficient. Defendant in error, in

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answer to a question, testified as follows: "Now, just a week or two before they closed, that note was in the bank, because I seen it. Charley Wiley, this Mrs. Greer being his aunt, he wanted to help her all he could and freeze the rest of us out. Both Downing and Allen and Barney will say they forbid him disposing of that note. But he took that note directly to Mrs. Greer himself."

Regarding the transfer of the note, the trial court finds as follows: "That no renewal of the certificates of deposit held by said Emma J. Greer was made at the time said note was indorsed or delivered to her; nor was any other security held by her surrendered in consideration of the transfer of said note to her. But that said note was indorsed and delivered to her by the cashier voluntarily and in violation of the bank's contract with defendant concerning said note and as additional security to her certificates." While the evidence in support of this finding is meagre, we are of opinion that it is sufficient. In *Schroeder v. Nielson*, 39 Neb., 335, it is said: "In a suit against the maker of a promissory note by an alleged indorsee thereof, as such, the defendant's answer denied plaintiff's ownership. Held, To entitle plaintiff to recover, he must establish, by competent evidence, that the indorsement on the note was that of the payee." In the case at bar, the indorsement on the back of the note, while not offered in evidence, is probably admitted by the answer, so far, at least, as the genuineness of the signature of Charles Wiley, the cashier, is concerned. The authority of the cashier to dispose of the note to Mrs. Greer may well be doubted. In *Boone, Banks and Banking*, section 104, it is said: "An indorsement by a cashier which will bind his bank must be within the scope of his duty as cashier. He can not, therefore, without special authority, transfer notes of the bank in payment of a deposit so as to bind the bank." *Schnitman v. Noble*, 75 Ia., 120. It is probably also true that the transfer of this note to Mrs. Greer was void under the provisions of section 5242, Revised Statutes of the United States, which prohibits the transfer

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of paper or other assets of a national bank in contemplation of insolvency.

But we do not care to rest the determination of this case upon either of these two grounds, putting it rather upon the ground that plaintiff in error wholly failed to establish by competent evidence ownership of the note, and that the note was obtained in the usual course of business for value before maturity. The finding of the trial court has the same force and effect of a verdict by a jury (*Westover v. Lewis*, 36 Neb., 692), and the rule is well settled that this court will not disturb such finding unless it is clearly wrong. *Blodgett v. McMurtry*, 34 Neb., 782; *Upton v. Levy*, 39 Neb., 331. The judgment of the trial court seems to be right, and it is recommended that the same be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

A. R. CRUZEN V. WILLIAM L. POTTLE, ADMINISTRATOR OF
THE ESTATE OF EMRY B. POTTLE, DECEASED.

FILED OCTOBER 9, 1902. No. 11,673.

Commissioner's opinion. Department No. 1.

1. **Contracts: PRESUMPTION OF KNOWLEDGE OF CONTENTS.** All men are presumed to read and understand the terms of contracts entered into by them, and in the absence of fraud, deception or other undue means in procuring their execution, they will not be permitted to escape a liability clearly expressed by the language of the contract.
2. **Mortgages: ASSUMPTION OF, IN DEED: ESTOPPEL TO DENY.** Where a grantee under a deed, by the terms of which he agrees to assume and pay a mortgage, for many years exercises ownership over the land conveyed, paying taxes, and interest on the mortgage, and joining in the execution of an agreement extending the time for the payment of the mortgage, he is estopped to deny that he assumed to pay the mortgage.
3. **Appeal and Error: REFUSAL OF TRIAL COURT TO MAKE SPECIFIC FINDINGS.** Refusal of the trial court to specifically find upon certain questions, *held*, under the facts in this case, not error.

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4. **Mortgages:** ASSUMPTION OF PAYMENT: EVIDENCE. Evidence examined, and found to sustain findings and judgment of the trial court.

ERROR from the district court for Lincoln county. Tried below before GRIMES, J. *Affirmed.*

T. C. Patterson, for plaintiff in error.

Wilcox & Halligan, contra. •

KIRKPATRICK, C.

This is an action brought in the district court of Lincoln county by William Pottle, administrator, against A. R. Cruzeu to recover the sum of \$500, with interest thereon, being the amount due on a note and mortgage executed by George N. Thomas and wife to Lew E. Darrow, and by him assigned, which it is claimed, A. R. Cruzeu, plaintiff in error, assumed and agreed to pay. The facts disclosed by the record, briefly stated, are as follows: In the year 1886, A. R. Cruzeu, and John B. Cruzeu, his brother, were engaged in conducting a banking business in the town of Curtis, Frontier county, Nebraska. The name, under which the business, of which they were the sole owners, was conducted, was the State Bank of Curtis. Besides the banking business, they were engaged in buying and selling real estate, being mostly the equity in lands subject to mortgages. The deeds to nearly all the lands handled were taken in the name of A. R. Cruzeu. On February 19, 1889, the bank purchased an equity from George N. Thomas and wife in the northwest quarter, of section 25, township 10 north, range 30 west. This land was subject to a mortgage for \$500, due May 1, 1893, and the deed executed by Thomas and wife was made subject to this mortgage. In April, 1889, John B. Cruzeu, who was a third owner in the bank, sold out his interest to his brother, who at that time owned the other two-thirds interest, and on May 13, 1889, he executed a warranty deed to his brother for the real estate purchased from Thomas.

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This deed, after describing the land, contained a condition in the words following: "Subject to a mortgage for \$500 and interest, and all taxes, that the said A. R. Cruzen is to assume and pay." This deed was placed of record in Lincoln county, where the land was situated, on May 15, 1889.

Plaintiff in error swears positively that he had no knowledge of the existence of the deed in question, and supposed, until shortly before this action was commenced, that the deed to the land in question had been, as in the case of other deeds to lands purchased by the bank, taken in his name in the first instance, rather than in the name of his brother, and that he never knew, until just before the commencement of this action, that his brother had executed this deed, or that the deed contained the provision that the grantee assumed and agreed to pay the mortgage.

John B. Cruzen testified that he made the deed, but that he did not know that it contained the provision that A. R. Cruzen was to assume and pay the mortgage. Both of the Cruzens testify that there never was any contract or agreement, by the terms of which A. R. Cruzen agreed to pay the note and mortgage in suit.

It is disclosed by the evidence that A. R. Cruzen paid the interest on the note and mortgage in suit up to May 1, 1895, the last payment being on January 15, 1898, amounting to \$69.18, and that he paid two years' taxes on the land. It is also disclosed that on May 1, 1893, A. R. Cruzen executed an agreement for an extension of the mortgage on the land in question in the form following:

"No. 9810. Extension of Farm Mortgage Bond. \$500. Whereas, Catherine S. Pottle has agreed to extend for the term of two years from May 1, 1893, the time of one bond for \$500, dated May 1, 1888, due May 1, 1893, and secured by a mortgage duly recorded in the recorder's office of Lincoln county, Nebraska. Now, therefore, I, A. R. Cruzen, the present owner of the land described in the mortgage, do hereby agree with Catherine S. Pottle, to

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pay the interest upon said bond, semi-annually, at the rate of seven per cent. per annum, at the times and places specified in the four interest notes for \$17.50 each hereto attached, and bearing even date herewith; and I further agree that all the stipulations and provisions of said bond, and all the covenants of the mortgage given to secure the same shall remain in full force and effect, so far as they can be applied hereto. Given under my hand this first day of May, 1893. A. R. Cruzen."

In January, 1898, plaintiff in error, being pressed for the payment of the mortgage in suit, offered to deed the land covered by the mortgage to defendant in error, providing he was released from all liability on account of the assumption of payment of the mortgage as provided in his deed. This apparently defendant in error refused to do. Plaintiff in error then executed a deed covering the land back to his brother, disclaiming any interest in the land, and claimed not to have known that the deed under which he obtained title contained the assumption clause. It is claimed by plaintiff in error that it is disclosed by the evidence that the deed in question from John B. Cruzen to his brother, A. R. Cruzen, was never delivered, and that A. R. Cruzen, therefore, never had title, and was not in any way bound by the assumption clause in the deed. To this contention we are unable to agree. The testimony shows that some time after A. R. Cruzen obtained title to the premises, he executed an extension agreement, which has hereinbefore been set out. In this agreement he represented that he was the owner of the land. It is also disclosed that he paid taxes on the land for at least two years, and paid two or more years' interest on the mortgage. These acts on his part amounted to an acceptance of title to the premises under the deed. All men are presumed to read and understand the terms of the contracts entered into by them. Plaintiff in error must be presumed to have known the contents of the deed under which he was claiming title to the premises. *Hawkins v. Hawkins*, 50 Cal., 558; *Taylor v. Fleckenstein*, 30 Fed. Rep., 99;

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Hazard v. Griswold, 21 Fed. Rep., 178; *Jaeger v. Whitsett*, 3 Colo., 105; *Rice v. Dwight Mfg. Co.*, 2 Cush. [Mass.], 80.

Plaintiff in error held title to the land in question under the deed, by the terms of which he agreed and assumed to pay the mortgage for a term of nearly nine years, and during that time the mortgagee entered into an agreement with him, by the terms of which the maturity of the note and mortgage were extended for a period of two years. In this extension agreement plaintiff in error represented that he was the owner of the land, and there can be no doubt that the mortgagee relied upon this representation. It would not be reasonable to suppose that a mortgagee would have entered into an agreement extending the maturity of his note with an entire stranger and one who had no interest in the premises. The assignee of the mortgage, the person who executed the extension agreement, is dead, and no testimony has been introduced showing that the mortgagee knew of the terms of the deed under which plaintiff in error obtained title. But there can be no question that the holder of the mortgage changed her position, relying upon the ownership of plaintiff in error. We are of opinion that plaintiff in error, after the lapse of nearly nine years from the execution of the deed under which he agreed and assumed to pay the mortgage debt, can not now be permitted to repudiate his contract and escape liability thereunder. *Bigelow, Estoppel* [2d ed.], 639. The only basis upon which business can be transacted is upon the presumption that men entering into contracts know and understand the terms of such contracts. In *Sutter v. Rose*, 48 N. E. Rep. [Ill.], 411, it is said: "Where a grantee, claiming that a clause requiring the assumption of a mortgage was fraudulently and without his knowledge inserted in the deed, failed to disaffirm it for ten months after notice of the fraud, until suit was brought by the mortgagee, he is estopped to set up the fraud."

In *Ver Planck v. Lee*, 53 Pac. Rep. [Wash.], 724, it is said: "Where a deed reciting that the grantee assumed a mortgage was taken by an agent without the knowledge

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or authority of the grantee, but he subsequently conveyed the property, covenanting that he was the owner in fee, and he knew of the assumption clause, and made payments of interest on the mortgage, he is estopped to say he did not assume the same." *Libbey v. Ralston*, 43 Pac. Rep. [Kan.], 294; *Fleming v. Reed*, 49 N. E. Rep. [Ind.], 1087.

Whether or not plaintiff in error actually knew that under the deed he had assumed and agreed to pay the mortgage we regard as immaterial after the lapse of nearly nine years, in view of the fact that it was his duty to examine the deed and know its contents. In *Farrell v. Bouck*, 60 Neb., 771, this court said: "One who fails, through culpable inertness, to make inquiry when it is his duty to inquire, and by reason of such failure loses a valuable right, is not entitled to relief in equity on the ground of mistake." *Willard v. Ostrander*, 26 Pac. Rep. [Kan.], 1017.

It is contended by plaintiff in error that inasmuch as under the holding in *Hare v. Murphy*, 60 Neb., 135, 82 N. W. Rep., 312, it is said the assumption clause in a deed is in the nature of a personal contract, and therefore not properly recorded, it would not be such notice as under the law is imparted by the recording of the deed. With the doctrine of that case we are agreed. But we are of opinion that it is not applicable to a party to a contract who is presumed to know what the contract contains.

Complaint is made that the trial court did not specifically find upon certain points requested by plaintiff in error. We are of opinion that plaintiff in error was in no way prejudiced by the action of the trial court in this regard.

It seems that the findings and judgment of the trial court were the only findings and judgment that could properly have been rendered under the evidence, and it is, therefore, recommended that the judgment of the trial court be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

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PATRICK J. CREEDON V. ELIZA W. PATRICK ET AL.

FILED OCTOBER 9, 1902. No. 11,778.

91 NW 872
Commissioner's opinion. Department No. 2.

1. **Reference:** ORDER OF CONTINUANCE NOT IN RECORD: NUNC PRO TUNC ORDER. A finding that the court at a previous term had determined that it was necessary and advisable to continue a pending reference, but through inadvertence had made no notation thereof on the trial docket, so that no order was spread upon the journal, is sufficient to sustain an order directing entry of an order of continuance *nunc pro tunc*, without any finding in such terms that the court made the order directed to be entered.
2. **Reference:** FILING REPORT OUT OF TIME: IRREGULARITY. While a referee has no power or jurisdiction to proceed with a hearing or perform any acts of a judicial nature after expiration of the time fixed by the court for making his report, filing the report out of time is a mere irregularity and does not preclude the court from acting thereon in its determination of the cause.
3. **Contracts:** WRITTEN BUILDING CONTRACT: ORAL EVIDENCE TO SHOW UNDERSTANDING AS TO CERTAIN MATERIALS. A written building contract provided that the work was to be done according to certain plans and specifications to the satisfaction of one of the parties "in design, workmanship, and finish." The plans and specifications contained no details as to certain materials required, and nothing was specified as to where they were to be obtained. *Held*, That parol evidence was admissible to show that at the time the contract was made such party insisted that said materials must be obtained in the east, because he considered the eastern designs, workmanship and finish superior, and to show that a subsequent purchase of such materials in the east was in pursuance of the understanding when the contract was made and to comply with the requirements he was empowered to make by its express terms.
4. **Appeal and Error:** REFERENCE: CONFLICTING EVIDENCE. The findings of fact of a referee, on conflicting evidence, confirmed by the district court after hearing on exceptions thereto, will not be disturbed on appeal.

ERROR from the district court for Douglas county. Tried below before FAWCETT, J. *Affirmed*.

T. J. Mahoney and J. A. C. Kennedy, for plaintiff in error.

Robert W. Patrick, contra.

POUND, C.

This suit was brought some ten years ago to foreclose a mechanics' lien. It involved an extremely laborious accounting with reference to about six hundred items, and, as counsel well put it, amounted practically to so many separate law suits. A reference was ordered at the May term, 1892, of the district court, and the referee was directed to report on the first day of the next term. On that day the time was extended and orders further extending the time were duly entered from term to term until the September term, 1897, when no order was put on record. Afterwards, at the February term, 1898, an order was made directing entry of an order of continuance *nunc pro tunc* as of the preceding term. The report of the referee was filed during the term to which the time was thus extended, but not until after the date fixed in the order. Exceptions were filed to the report and a hearing extending over a long period, if we may judge from the recitals in the record, resulted in a decree confirming its main features and disposing of the case substantially in conformity therewith. That decree is brought before us by petition in error.

The first assignment of error argued relates to the entry of the order *nunc pro tunc* extending the time for the referee to report. In the findings upon which the action of the court directing this entry are based it is set forth that the court had determined at the preceding term that it was necessary and advisable to extend the time and had so informed the referee, but through inadvertence had made no notation of its decision on the trial docket so that no order was spread upon the journal. It is argued that this finding does not sustain the order for the reason that it does not appear that the court made any order extending the time, but merely determined the questions of fact from which such an order would follow. Of course no order can be entered *nunc pro tunc* unless it was in fact made in the first instance. The circumstance that the court should have made it will not suffice. *Garrison*

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v. The People, 6 Neb., 274. This, however, means only that the court must have determined upon some judicial action. If it had given the determination expression no need for an entry *nunc pro tunc* would have arisen. But having omitted this through inadvertence, it becomes necessary to make the formal record of the decision which, though actually arrived at, had not been stated. Here it appears that the court inquired into the facts and decided that an extension was necessary. Not only did it determine this point, but it notified the referee of its conclusion. These circumstances, found by the court, are sufficient evidence that an order was in fact made and sustain the order directing the entry *nunc pro tunc* without any finding in express terms that the court made the order directed to be entered.

It is argued further that the referee lost jurisdiction by not filing his report within the time fixed by the last order with reference thereto and as a consequence that the court erred in rendering a decree upon the report. A referee has no power or jurisdiction to proceed with a hearing or perform any acts of a judicial nature after expiration of the time fixed by the court for making his report. *Robinson v. O'Conner*, 12 Neb., 405. But, after the testimony has been taken and the referee has reached a determination upon the questions submitted to him, the filing of a report is a mere ministerial act. Filing the report out of time is an irregularity only and does not preclude the court from acting thereon in its determination of the cause. *Dietrichs v. Lincoln & N. W. R. Co.*, 13 Neb., 43; *Brown v. Williams*, 34 Neb., 376, 382; *Gibson v Gibson*, 24 Neb., 394, 406. In the case at bar, it appears that the testimony had all been taken, the cause fully argued, and the findings and conclusions of the referee determined upon prior to the time set. The referee was ready to file his report at that time, but refused to do so until paid his fees. His failure to file the report at the time set did not invalidate it.

Coming to the merits of the cause, we are confronted

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with a record characterized aptly by counsel as "horribly voluminous." But counsel have relieved us of a great deal of labor by confining themselves to the findings upon one item, so that we are not asked to go into the evidence at large except as it bears thereon. The item in controversy grows out of the purchase of the hard wood required for the interior finish of one of the buildings referred to in the contract between the parties. The plaintiff contends that after the contract had been entered into defendants requested him to purchase the hard wood of a particular firm in New York and agreed to pay the difference between what it would cost when furnished by that firm and the amount for which it might be procured elsewhere. Defendants, on the other hand, assert that it was required and understood that the hard wood should be bought in the east and that the plaintiff lost nothing by procuring it where he did. Some question is raised as to the competency of the parol evidence adduced by defendants. But we are satisfied that it was admissible. The written contract provided that the work was to be done according to certain plans and specifications to the satisfaction of the defendant, John N. H. Patrick, "in design, workmanship, and finish." The plans and specifications contained no details as to the hard wood, and it appears that the details were not made till about the time the wood was purchased. Nothing was specified as to where it was to be obtained. The defendants' evidence tended to show that said John N. H. Patrick insisted that it must be bought in the east because he considered the eastern designs, workmanship and finish superior, and that the subsequent purchase in New York was in pursuance of his insistence on this point and in accordance with the understanding of the parties when the contract was made. Mr. Patrick had a right under the contract to require such designs, workmanship, and finish as he preferred. Those matters were left to his judgment by the written contract. Hence the parol evidence in no way conflicted with the terms of that instrument. It explained the provision already referred to by

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showing what the parties understood Mr. Patrick would require in order to be satisfied with the design, workmanship and finish, as to this item, at the time the contract was made, and indicated that the wood was bought as it was in order to comply with that provision and the requirements Mr. Patrick was empowered to make by reason of it. This was competent. *Tootle & Maule v. Elgutter*, 14 Neb., 158. If this evidence is believed, the hard wood was procured in New York by reason of the construction the parties themselves put on the original contract, and the letter relied upon by plaintiff acquires a different meaning. As to the circumstances under which that letter was written and received, the acts of the parties thereafter, and the cost of the materials, the evidence is largely conflicting, and there is sufficient to sustain the findings of the referee, already confirmed by the trial court. It is not our duty to reach an independent conclusion under such circumstances. *School District No. 1, Harlan County, v. Bishop*, 46 Neb., 850.

We recommend that the decree be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

FRANK TRISKA ET AL. V. THEODORE H. MILLER ET AL.

FILED OCTOBER 9, 1902. No. 12,013.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: TRIAL TO COURT: PRESUMPTION AS TO EVIDENCE.**
In a cause tried to the court without the intervention of a jury, the presumption is that the trial court considered only competent testimony in arriving at a decision.
2. **Pleading: ADMISSIONS IN ANSWER.** Answer examined, and held not to be an admission of the allegations of the petition.
3. **Appeal and Error: REFUSAL OF CROSS-EXAMINATION OF WITNESS.**
Certain rulings of the trial court refusing to permit the cross-examination of a witness examined, and held not prejudicial error.
4. **Mortgages: REDEMPTION: EVIDENCE: SUFFICIENCY.** Evidence examined, and found to sustain the finding and decree of the trial court..

Triska v. Miller.

ERROR from the district court for Saline county. Tried below before STUBBS, J. *Affirmed.*

G. M. Johnston and J. E. Cobbey, for plaintiffs in error.

F. I. Foss, A. S. Sands, J. H. Grimm, B. V. Kohout and R. D. Brown, *contra.*

KIRKPATRICK, C.

This is a suit in equity in the nature of an application for accounting and redemption from foreclosure of various mortgages and sale of certain lands in Saline county brought in the district court June 2, 1900. The pleadings are voluminous and can not be set out. The matters disclosed by the record, briefly stated, are as follows: on the 21st day of January, 1897, Frank Triska was the owner of two hundred and forty acres of land subject to the following mortgages, of priority in the order named: \$2,000 to James B. Russell; \$1,000 to Margaret E. Manzy; \$3,000 to Theodore H. Miller, defendant in error, upon which \$500 had been paid; \$1,000 to Carl Sagl, assigned to Robert R. Sands; \$200.46 to Doede Smith, and \$827 to J. F. Chaloupka, assigned to the Blue Valley Bank. Considerable interest had matured, so that the total amount of incumbrance was about \$8,000 besides delinquent taxes. On January 21, 1897, the date above mentioned, defendant in error, Miller, was threatening foreclosure. Frank Triska and wife went to A. S. Sands, an attorney in Wilber, and entered into some kind of an agreement with him, by the terms of which they deeded to him all the land, and gave him a bill of sale of most of their personal property, and accepted from him a lease for eighty acres of the land for two years.

There is a sharp conflict in the evidence regarding the agreement with Sands, the Triskas claiming that Sands was to apply the proceeds of the personal property, and the rents and profits arising from the land, upon the indebted-

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edness, and that they were to have five years in which to pay up all incumbrances, and have the land reconveyed to them. Sands claims that he was to fight any foreclosure proceedings brought by Miller, and keep them in possession of eighty acres of the land for two years, and that the proceeds of the personal property were to be applied as attorney's fees and credited on the \$1,000 mortgage held by Robert R. Sands. The consideration named in the deed was \$8,000, which Sands claims was to be credited on the note. Sands almost immediately transferred the lands to other persons. Defendant in error, Miller, on learning of the deed to Sands, immediately commenced foreclosure proceedings on his mortgage. Personal service of summons was made upon Frank Triska and wife, plaintiffs in error herein, and on May 11, 1897, Miller obtained a decree of foreclosure for \$3,080.96. A stay was taken by other defendants which was later withdrawn, and on March 12, 1898, the land was sold by the sheriff to Theodore H. Miller, plaintiff below, defendant in error herein, for \$3,400. Triska and wife by attorneys filed objections to the sale, which were overruled, the sale confirmed, and Triska thereupon executed a bond for the purpose of appealing to this court from the order of confirmation, but an appeal was never perfected. Defendant in error, Miller, after getting a sheriff's deed for the land, sold two eighties to other parties, and received payment of the purchase price therefor. No proceedings other than those in the case at bar have ever been had to set aside the decree of foreclosure or the confirmation of sale, and they each remain in full force and effect.

Plaintiffs in error allege that defendants in error, Miller and Sands, entered into a conspiracy to defraud them out of their land and personal property; that Miller represented to them that the foreclosure suit brought by him was to get their conveyance to Sands set aside, and get the title back in them; and that, relying upon his representations, they made no defense in the foreclosure proceedings; that Sands was working with Miller, filed a re-

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quest for stay on behalf of other defendants, withdrew the same, and permitted Miller to issue an order of sale, buy the land, and get the sale confirmed, all without knowledge, and that the entire foreclosure proceedings were a fraud. Plaintiffs in error are Bohemians, and can neither speak, read nor write the English language. All of these matters were denied by defendants in error, Miller and Sands. Trial was had, which resulted in a finding and judgment against plaintiffs in error, dismissing their petition, and from such judgment of dismissal they bring the cause to this court upon error.

Two grounds of error are urged by plaintiffs in error: first, that under the pleadings plaintiffs in error were entitled to redeem, and that the court should have proceeded to an accounting to determine the amount they should pay. The answer of defendant in error, Miller, contained a general denial of all allegations of the petition not thereafter admitted, and, among other things, set out in detail the ownership of his mortgage, the commencement of his suit to foreclose, the decree, sheriff's sale, confirmation, and the fact that he had sold certain portions of the land to other parties, and specifically denied any interest in or connection with the transaction between plaintiffs in error and Sands; and it is contended on behalf of plaintiffs in error that by pleading a general denial, and following it by pleading another agreement and a different state of facts, defendant in error, Miller, in effect admits the allegations of the petition. The answer will not bear the construction sought to be placed upon it by plaintiffs in error. If the answer were in the nature of a confession and avoidance there might be merit in the contention. But while the answer contains much immaterial matter which is surplusage, we find nothing therein relieving plaintiffs in error from the burden of proving the allegations of their petition. This they have failed to do, and their first contention can not be sustained.

It is next contended that the court erred in admitting in evidence a lease, entered into between defendant in error,

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Miller, and F. J. Triska, a son of plaintiff in error. There seems to be no prejudicial error in this ruling. It is the settled rule in this state that in a trial to the court, it will be presumed that the court only considered competent evidence in reaching its conclusion. *National Masonic Accident Association v. Burr*, 57 Neb., 437; *Buckingham v. Roar*, 45 Neb., 244.

The last contention is that the court erred in permitting defendant in error, Miller, to testify as to the amount the land cost him, and then in refusing to plaintiffs in error the right to cross-examine on this testimony. In view of the fact that the evidence of plaintiffs in error failed to establish their charge of conspiracy and to impeach the validity of the decree of foreclosure, the ruling complained of is, at most, error without prejudice. We have examined the evidence very carefully, and are unable to say that it does not support the finding and judgment of the trial court. The judgment is right, and it is recommended that the same be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

LULU N. HUMPHREY v. WILLIAM A. HUMPHREY.

FILED OCTOBER 9, 1902. No. 12,073.

Commissioner's opinion. Department No. 2.

1. **Divorce: ACTION TO SET ASIDE: SUFFICIENCY OF EVIDENCE.** Evidence examined, and *held* sufficient to sustain the judgment of the trial court.
2. **Continuance: OVERRULING MOTION FOR.** Action of the trial court, in overruling plaintiff's motion for continuance, approved.
3. **Evidence: WITNESS UNABLE TO ATTEND TRIAL: EVIDENCE TAKEN BY TRIAL JUDGE AT HOME OF WITNESS: DISCRETION.** The action of the trial judge in going to the home of a witness who was physically unable to attend court and permitting her testimony to be taken in his presence there, *held*, not an abuse of judicial discretion.

Humphrey v. Humphrey.

ERROR from the district court for Cass county. Tried below before JESSEN, J. *Affirmed.*

J. C. Cowin and A. N. Sullivan, for plaintiff in error.

Byron Clark and C. A. Rawls, contra.

OLDHAM, C.

On the 4th day of January, 1898, the plaintiff in this cause of action procured a decree of divorce and alimony from the defendant, on the ground of abandonment, in the district court of Cass county, Nebraska. In the latter part of the year 1899, the plaintiff instituted this cause of action for the purpose of having this decree of divorce and alimony which she formerly procured set aside for the alleged reason that said decree had been obtained by fraud and intimidation practiced upon her by the defendant through collusion with the attorney who represented her in the proceeding. The petition is exceedingly lengthy and details a most reprehensible and revolting narrative of crimes and persecutions alleged to have been perpetrated upon the plaintiff by the defendant during a period of about fifteen years of her married life. It is alleged that as a result of the inhuman treatment to which plaintiff was subjected she became weak in body and disordered in mind until she was wholly incapacitated from transacting business and from realizing and knowing the legal effect of her acts, and that while in this condition the defendant by threats of leaving the country and taking the only child of their marriage with him, and refusing to contribute anything for her support and leaving her in a destitute condition, induced her to institute the divorce proceeding which she now seeks to have set aside. Defendant filed an answer to this petition denying each of these allegations and alleging that plaintiff had ratified the decree of divorce and alimony by accepting the alimony awarded her. There was trial to the court and a judgment for defendant and plaintiff brings error to this court.

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It could accomplish no useful purpose to comment upon the sad story of domestic infelicity revealed by the testimony contained in the bill of exceptions in this cause, nor is any of this testimony relevant to the issues in the case at bar, except in so far as it tended to show the mental condition of the plaintiff at the time she instituted the suit for divorce which she now seeks to have set aside and the possible influence that fear of vengeance from the defendant might have had upon her. The trial court gave plaintiff a most liberal range of investigation of everything that tended to show these possible influences, and after a patient and lengthy hearing, in accordance with the clear preponderance of the evidence he found the issues against her contention.

There is nothing in the testimony that tends in the remotest degree to show any bad faith on the part of plaintiff's counsel in procuring the original decree of divorce. While the evidence shows that plaintiff was physically weak and in bad health at the time the divorce was procured, yet the testimony strongly tends to show that she fully understood the purpose and effect of the suit and expressed satisfaction with the result of the action when she received her first installment of the alimony awarded. It is useless to say that in this state of the record we would be justified in interfering with the judgment of the trial court because not sustained by sufficient evidence.

Complaint is made of the action of the trial court in overruling plaintiff's application for a continuance of the cause. This application was made on the ground that plaintiff herself was physically unable to appear in court and give testimony. Instead of sustaining the application the trial court went to the residence of plaintiff with the officers of the court and the attorneys of plaintiff and defendant and had her testimony taken there in his presence. We think that the trial judge in whose presence this testimony was taken was best able to determine whether or not the plaintiff was in a proper mental condition to testify, and we find nothing in the record that

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tends to show any abuse of discretion in this matter, and we therefore recommend that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

W. W. DE WOLF V. THE VILLAGE OF BENNETT ET AL

FILED OCTOBER 9, 1902. No. 12,094.

Commissioner's opinion. Department No. 3.

Municipal Corporations: SERVICES RENDERED VILLAGE: PLEADING PRIOR APPROPRIATION. Ordinarily, in an action to recover for services rendered a village, a petition, which does not allege a prior appropriation for such services, is vulnerable to a general demurrer. *Lincoln Land Co. v. Village of Grant*, 57 Neb., 70, distinguished.

ERROR from the district court for Lancaster county. Tried below before FROST, J. *Affirmed.*

C. S. Rainbolt, for plaintiff in error.

R. D. Stearns, contra.

ALBERT, C.

The following petition was filed in the district court:

"1. The plaintiff is a physician and surgeon duly authorized by the state board of health of the state of Nebraska to practice medicine and surgery in said state. The certificate authorizing this plaintiff to practice medicine and surgery in this state, issued by said board of health has been duly filed in the office of the county clerk of Lancaster county, Nebraska, and is now of record in said office.

"2. The defendant is and at all times herein mentioned was a municipal corporation duly organized and existing under and by virtue of the laws of the state of Nebraska governing villages.

"3. Said defendant corporation at all times herein mentioned was authorized by the statutes of Nebraska to and

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had the power to 'provide pest houses'; 'to prevent the introduction and spread of contagious diseases,' and to make contracts and incur expenses for that purpose.

"4. On or about the 28th day of June, 1899, one Ross, a resident of the village of Bennett, was afflicted with a contagious and malignant disease commonly called small-pox, and the other residents of said village were in danger of contracting said disease.

"5. Said defendant acting by and through its trustees established a pest house outside the corporate limits of said village and requested the plaintiff herein to remove said Ross to said pest house for the purpose of preventing the spread of said disease and said defendant, by and through its trustees, requested this plaintiff to take charge of and treat said case and prevent the spread of said disease, for all which said defendant, through its trustees, agreed to pay the plaintiff. In pursuance of said request and agreement the plaintiff did cause the said Ross to be removed from said village to said pest house and did treat said Ross professionally and did fumigate certain buildings, which were infected, and did such other work and exercised such care as was necessary to and did prevent the spread of such disease.

"6. The defendant accepted and received the said services of this plaintiff and the trustees of said defendant village were at all times duly advised that said services were being performed and said services were at all times accepted and received by them without objection.

"7. Plaintiff charged defendant for said services the sum of \$104 which was a fair and reasonable charge therefor and said account was presented to defendant and filed with its board of trustees and demand made for the payment thereof, but payment thereof was refused and said amount now remains due and unpaid from the defendant, the village of Bennett, to this plaintiff.

"Wherefore plaintiff prays judgment against the defendant for the sum of \$104 and interest thereon from August 3, 1899, and costs of this suit."

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The defendant interposed a general demurrer, which was sustained; the plaintiff electing to stand on his petition, judgment was rendered accordingly. The plaintiff brings the case here on error.

The defendant contends that it was necessary for the plaintiff to plead the contract, and that the proper preliminary proceedings had been taken by the village board, showing that an appropriation had been made, because, without such appropriation, the defendant had no authority to make contracts or create liabilities like that involved in this case. We think this contention is clearly sustained in *City of Kearney v. Downing*, 59 Neb., 549. That was an action to recover for supplies furnished by the plaintiff to the temporary poor of the city of Kearney. The petition was assailed by demurrer, which was overruled. NORVAL, J., after a careful review of the provisions of the statute relative to municipal corporations, and the authorities, says: "There is no averment in the petition to the effect that the city of Kearney, by ordinance or otherwise, had made an appropriation of any sum of money to be devoted to the relief of the temporary poor within the city, or for any other purpose. Therefore, under the provisions of the statute quoted, the city of Kearney could not lawfully incur an indebtedness for relief furnished its temporary poor." The judgment of the district court was reversed. The plaintiff in this case, however, relies on *Lincoln Land Co. v. Village of Grant*, 57 Neb., 70, wherein it is held, that where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was void because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received. The case was brought to recover the rental value of certain hydrants furnished by the plaintiff to the defendant. The plaintiff pleaded an express contract, which the court held to be void, but, as the petition contained sufficient facts to show an implied contract, it was held sufficient against a general demurrer. The distinction between the case at

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bar and that case is, that before the former was decided it had been held, in *North Platte Water Works Co. v. City of North Platte*, 50 Neb., 853, that the power given by statute, to municipal corporations to contract with individuals, or corporations, for a supply of water, to be furnished for the use of the city for a term not exceeding twenty-five years, implied the power to provide that payments might be made, as the right to receive them should accrue, without an appropriation having been previously made with reference to the several payments as they should mature. In other words, that a prior appropriation, by ordinance or otherwise, was not essential to such contract. In *Lincoln Land Co. v. Village of Grant*, *supra*, SULLIVAN, J., while disapproving of the doctrine announced in *North Platte Water-Works Co. v. City of North Platte*, for reasons appearing in the opinion, yields to its force as a precedent, and predicates the decision on the fact, that, as no appropriation was necessary to enable the city to enter into an express contract for the use of the hydrants, it was not essential to plead such appropriation. The case is clearly distinguishable from the one at bar, which rests on a claim for which a prior appropriation is essential.

In our opinion, the demurrer was properly sustained, and we recommend an affirmance of the judgment of the district court.

AMES and DUFFIE, CC., concur.

AFFIRMED.

HERMAN MENDEL V. JAMES E. BOYD.

FILED OCTOBER 9, 1902. No. 12,114.

Commissioner's opinion. Department No. 2.

1. **Gaming:** GAMBLING TRANSACTIONS ON BOARD OF TRADE: LEGALITY: EVIDENCE. Evidence examined and *held* to establish the fact that the transactions complained of were mere speculations on the rise and fall of the market price of grain on the board of trade, and were therefore illegal and void.

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2. **Gaming: GAMBLING ON BOARD OF TRADE: DRAFTS: DEFENDANT PUT UPON INQUIRY.** The drafts used in the deals complained of having been drawn to the order of the cashier of the bank which was defrauded, by himself or at his instance by the assistant cashier, were sufficient, of themselves, to put the defendant upon inquiry as to the nature and ownership of the funds used by them in the transactions.
3. **Gaming: TRANSACTIONS ON BOARD OF TRADE: LIABILITY OF BROKER.** The broker in such transactions will be held liable to the true owner of the funds, even if he has no knowledge of the ownership thereof. *Central Stock and Grain Exchange v. Bendinger*, 109 Fed. Rep., 926.
4. **Gaming: TRANSACTIONS ON BOARD OF TRADE: PAYMENT TO JOINT TORT-FEASOR: LIABILITY OF BROKER.** Payment to the joint tort-feasor without tracing the money into the hands of its owner is no defense in an action against the broker to recover the money lost in such deals.
5. **Gaming: BOARD OF TRADE: CONVERSION BY BROKER: LIABILITY: MITIGATION OF DAMAGES.** In such an action the broker should be charged with the amount of the trust fund actually received and converted by him, and he is entitled to credit, by way of mitigation of damages, for all of the money repaid by him which can be traced back into the hands of the owner thereof.
6. **Gaming: BOARD OF TRADE: MONEY LOST BY BANK CASHIER: SURETIES MAKE GOOD: SUBROGATION.** When a bank cashier is a defaulter to his bank for money used in gambling on the board of trade, and his sureties to the bank pay his shortage, they are subrogated to the rights of the bank against the broker with whom the money was lost.
7. **Gaming: TRANSACTIONS ON BOARD OF TRADE: EVIDENCE: SUFFICIENCY.** Evidence examined, and held not sufficient to sustain the verdict.

ERROR from the district court for Douglas county.
Tried below before SLABAUGH, J. *Reversed.*

Gaines, Storey & Kelby, and John P. Breen, for plaintiff in error.

Where an officer of a bank draws checks or drafts on the bank to pay his own private debts, the party receiving such checks or drafts is put upon inquiry as to whether or not such officer has paid for such checks or drafts. The rule applies with special force in cases involving board of trade speculations. *Lamson v. Beard*, 94 Fed.

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Rep., 30; *Rochester & Charlotte Turnpike Road Co. v. Paviour*, 164 N. Y., 281, 52 L. R. A., 790, and note.

Boyd became a party to the wrong done the bank and notice of the embezzlement of Watts was not material. *Cook v. Monroe*, 45 Neb., 349; *Hill v. Campbell Commission Co.*, 54 Neb., at page 60; *State v. Omaha Nat. Bank*, 59 Neb., 483; *Central Stock & Grain Exchange v. Bendinger*, 109 Fed. Rep., 926.

Boyd was a joint *tort-feasor*, and as such must respond to the bank to the full amount of its damage because he took more than enough to occasion all the loss or damage which the bank sustained. *Central Stock & Grain Exchange v. Bendinger*, 109 Fed. Rep., 926; Cooley, Torts [2d ed.], pp. 153, 154, 155, 156; *Sprague & Carey v. Kneeland*, 12 Wend. [N. Y.], 161; *Cuddy v. Horn*, 46 Mich., 596; *Smethurst v. Proprietors of Independent Congregational Church*, 2 L. R. A. [Mass.], 695, and note.

Boyd could not claim the amounts paid back to the bank as off-sets in his favor. The bank did not consent to so receive them. *Kissam v. Anderson*, 145 U. S., 435; *McAfee v. Crofford*, 54 U. S., at page 455.

Where the debtor has made no application of payments the creditor may apply them so as to best serve his own interests. The same rule is true as to the time when the creditor may exercise this right. This has been held to extend to the time application is made under direction of the court and the bringing of the suit itself has been held as an election by the plaintiff as to how funds shall be applied. 2 Am. & Eng. Ency. Law [2d ed.], pp. 437, 446; *Starrett v. Barber*, 20 Me., 457; *Garrett's Appeal*, 100 Pa. St., 597.

The return deposits should have been applied as of the dates upon which they were made. It was the duty of the court to make such application. 2 Am. & Eng. Ency. Law [2d ed.], pp. 447, 452, 455, 456, 461.

The bondsmen were subrogated to the status of the bank with reference to its loss. *Dering v. Earl of Winchelsea*, 1 White and Tudor, Leading Cases in Equity, *110, notes;

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City of Keokuk v. Love, 31 Ia., 119; *Heuser v. Sharman*, 89 Ia., 355; *Blake v. Traders' Nat. Bank*, 145 Mass., 13; *Cowgill v. Linville*, 20 Mo. App., 138; May, Insurance [4th ed.], section 454; *Mobile Ins. Co. v. Columbia & G. R. Co.*, 44 Am. St. Rep., at page 731, note; 24 Am. & Eng. Ency. Law [1st ed.], 216.

S. R. Rush and Howard B. Smith, contra.

The transactions on the board of trade were not illegal because Watts had a right to demand the delivery of the article purchased by him from Boyd. *Clews v. Jamieson*, 182 U. S., 461; *Hibblewhite v. M'Morine*, 5 Mees. & Wels. [Eng.], 462; *Pearce v. Rice*, 142 U. S., 28; *Pickering v. Cease*, 79 Ill., 328.

The bondsmen were not subrogated to the rights and remedies of the bank as against the defendant. *Sheldon, Subrogation* [2d ed.], section 86; *Bohn Sash and Door Co. v. Case*, 42 Neb., 281; *Arlington State Bank v. Paulsen*, 57 Neb., 717, 59 Neb., 94; *Mobile Life Ins. Co. v. Brame*, 95 U. S., 754; *Rockingham Mutual Fire Ins. Co. v. Bosher*, 39 Me., 253; *Ashley v. Dixon*, 48 N. Y., 430; *Grove v. Bradenburg*, 7 Blackf. [Ind.], 234; *Dunlap v. Glidden*, 31 Me., 435; *Anthony v. Slaid*, 11 Met. [Mass.], 290.

Application of payments must be made before a controversy has arisen. 2 Am. & Eng. Ency. Law [2d ed.], 446, note 1. The debtor must have had an opportunity for making the application himself. *Id.*, 439, note 2. In case the money is furnished by a third person the creditor is bound to apply it to the debt upon which such third person or his property would otherwise be liable. *Id.*, 440 and 441, note, and *Crane Bros. Mfg. Co. v. Keck*, 35 Neb., 683, 685. Where third parties intervene the right of the creditor to appropriate the payment as his own interests may dictate, has gone as against such third person. 2 Am. & Eng. Ency. Law [2d ed.], 447, note 1. When neither debtor nor creditor makes the application the court

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will make such application so as to do the greatest equity. *Id.*, 447, note 2; 452, note 4. Where the creditor holds two or more claims for one of which a particular fund is liable and money is received by him which arose out of that fund such payment in the absence of a contrary agreement will be applied to extinguish that particular claim. *Id.*, 466, subdivision 4.

The defendant had a right to have the damages mitigated to the amount of the sums that had been returned to the bank. *Anderson v. Kissam*, 35 Fed. Rep., 699; *Coburn v. Watson*, 48 Neb., 257; *Thomas v. City National Bank of Hastings*, 40 Neb., 501, 506; 3 Sutherland, Damages [1883 ed.], p. 528.

BARNES, C.

This suit was commenced in the district court of Douglas county by Herman Mendel against James E. Boyd to recover a judgment on account of certain money of the State Bank of Neola, alleged to have been lost by one J. C. Watts, cashier of the said bank to Boyd in speculating with him in certain gambling transactions on the rise and fall of the market price of grain; the transactions being commonly known as bucket shop or board of trade deals. It appears from the record and bill of exceptions that in May, 1896, J. C. Watts, who was cashier of the State Bank of Neola, commenced to withdraw its funds and speculate with them in the manner aforesaid; that his deals were made by and through George H. Sidwell & Company of Chicago and James E. Boyd of Omaha. So far as the record shows these parties had nothing to do with each other, the deals being separate and distinct transactions. It is claimed that nineteen of the bank's drafts were drawn to the order of J. C. Watts, amounting in all to \$21,125, on the Chemical National Bank of New York city, and indorsed by him to Boyd. These drafts were drawn by Watts himself or his assistant cashier at his instance and were traced directly to the defend-

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ant, who admitted that he received the money thereon. It is claimed that certain other drafts were drawn to Watts and indorsed by him to Sidwell & Company of Chicago; and there was thus used of the bank's money over \$46,000; that \$18,500 of the money received by Boyd had never been returned to the bank; that the plaintiff, Mendel, and one Dillin were sureties, to the bank, on the bond of Watts, as its cashier, and as such sureties had paid the shortage in full; that Dillin had transferred all of his rights, by reason of such payment, to the plaintiff, who was thereafter and thereupon subrogated to the rights of the bank as against Boyd. The plaintiff prayed for a judgment against the defendant for the sum of \$21,125. The cause was tried to a jury, and a verdict was returned for the defendant; judgment was rendered thereon and plaintiff thereupon prosecuted error to this court.

We find very little, if any, conflict in the evidence; it is established beyond question that Boyd received of Watts \$21,125 of the bank's money; that he has returned to Watts as much or more than that amount, but he was only able to trace a part of it back into the bank, leaving a balance which, so far as this record is concerned, must be treated as having never been returned.

1. The evidence contained in the record and bill of exceptions fully sustains the view of the trial court, that the deals between J. C. Watts and the defendant were speculations on the rise and fall of the market price of grain, mere gambling transactions, and were therefore illegal and void. They clearly fall within the rule of *Rogers & Bro. v. Marriott*, 59 Neb., 759; *Sprague v. Warren*, 26 Neb., 326; *Watte v. Wickersham*, 27 Neb., 457.

2. It is contended by plaintiff that the judgment should be reversed, and that defendant is liable for all of the losses of the bank. It is claimed that the defendant, having joined with cashier, Watts, in these illegal transactions, he became a joint *tort-feasor*, and liable jointly and severally with him for all of the money he took from the bank. The courts have always held the broker liable for

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the money received by him in deals of this kind. In the case of *Lamson v. Beard*, 94 Fed. Rep., 30, the court held that drafts drawn to the order of the president of a bank on its correspondents for funds of such bank on deposit with them, and paid to certain brokers for margins on transactions in futures, carried for the president personally, were sufficient of themselves to put the brokers on their inquiry as to the president's authority to draw them. They were therefore held liable to the bank for the proceeds of the drafts. The drafts in question in this case having been drawn to the order of the cashier were sufficient, of themselves, to put the defendant upon inquiry as to the ownership of the funds. The courts now hold that the broker is liable without regard to the question of his knowledge of the nature of the funds. *Central Stock & Grain Exchange v. Bendinger*, 109 Fed. Rep., 926. The reason of the rule is "that the broker is not a *bona fide* holder for value." An act that is criminal and void can not be said to be founded on good faith, or a valuable consideration. A third person holding money, and defending against the owner, must show some better case than that he acquired the money in violation of law. *Central Stock & Grain Exchange v. Bendinger*, *supra*. This is extending the liability to the limit, and we decline to go further and make the defendant liable for funds which he never received. We hold the rule to be, in this case, that the defendant should be charged with the amount of the bank's funds which were actually paid to him; but he is not liable for the money paid to Sidwell & Company. It is alleged in the petition that he received, of the bank's money, \$21,125, and the proof contained in the record supports this allegation. The instructions of the trial court on this point were correct, and should be upheld.

3. It is contended by the plaintiff that the money returned should be credited according to the rule of application of payments by which each sum of money, returned to the bank, should be applied to the payment of Watt's oldest

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indebtedness first. The result of such a rule in this case would be to charge the defendant with all of the money withdrawn from the bank, no matter to whom paid, and thus plaintiff, in effect, would receive the benefit of his contention that Boyd was liable, not only for the money which he received, but also that which was paid over to George H. Sidwell & Company. The trial court refused to so hold, and instructed the jury that defendant was entitled to credit by way of mitigation of damages for all the money which was traced back directly into the bank, or to its correspondent banks for its use and benefit. We approve of this rule. The defendant should be charged with all of the bank's money actually paid to and received by him in these grain deals, and should have credit by way of reduction of damages for all the money paid back by him to Watts, which was traced back to the bank, or for which it got credit in its correspondent banks. The measure of recovery in this case would be the difference, if any, between such sums, together with interest thereon at the rate of seven per cent. per annum from the time of the payment of the shortage by the plaintiff. We further hold that payment of the funds back to Watts without tracing them direct to the bank, the owner thereof, is no defense in this action.

4. It is contended by plaintiff that the verdict is not sustained by the evidence. The proof shows, beyond question, that the defendant received from J. C. Watts \$21,125 of the bank's money; that he was able to and did trace back into the bank so much of the money paid by him to Watts on these grain deals that the balance so unaccounted for was about \$3,500. It is claimed by the defendant that the verdict was supported by the evidence because in the deposition of Watts, which appears in the record, he testified that he had returned all of the money to the bank but four or five hundred dollars. All the rest of the evidence tends to show that the shortage was in the neighborhood of \$3,500. Therefore, in any event, the verdict in this case should have been for the

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plaintiff. We are satisfied that a verdict for \$3,500 would not have been excessive. For this reason the judgment herein must be reversed.

5. The plaintiff having shown that he was one of the bondsmen of Watts, and that he, with others, paid the losses of the bank occasioned by the transactions complained of, and having obtained an assignment of the rights of his co-surety, he was thereupon subrogated to all the rights of the bank, and can maintain this suit.

For the reasons stated in the foregoing opinion we recommend that the judgment of the district court be reversed, and the cause remanded for a new trial.

OLDHAM and POUND, CC., concur.

REVERSED AND REMANDED.

S. KNUDSON, SHERIFF OF PHELPS COUNTY, NEBRASKA, v.
JULIA M. PARKER ET AL.

FILED OCTOBER 9, 1902. No. 12,115.

Commissioner's opinion. Department No. 3.

Fraudulent Conveyances: TRANSACTIONS BETWEEN RELATIVES: BONA FIDES. Transactions between relatives by reason of which strangers who have sold goods to some of such relatives will be deprived of payment therefor, will be scrutinized very closely and the good faith of the same must be clearly established. *Bartlett v. Cheesbrough*, 23 Neb., 767.

ERROR from the district court for Phelps county. Tried below before ADAMS, J. *Reversed*.

G. Norberg and Olency St. Clair, for plaintiff in error.

James I. Rhea, *contra*.

DUFFIE, C.

JUNE 15, 1895, Snow Brothers, doing a general merchandise business at Holdrege, Nebraska, made to their uncle,

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Samuel A. Parker, a chattel mortgage upon their entire stock of goods and fixtures to secure a claimed indebtedness of \$2,774.75. At the same time they executed and had filed for record one mortgage to the United States National Bank of Holdredge, one to the Symns Grocery Company, and one or more others, subject, however, to the mortgage given to Parker. The mortgages made to the United States National Bank and to Symns Grocery Company were executed and filed without the knowledge or consent of the grantees who refused to accept them and who afterwards procured and levied writs of attachment upon the property covered by the Parker mortgage. Parker thereupon replevied the goods covered by his mortgage from Knudson, the sheriff in possession under the attachments. The replevin case was tried to a jury April 10, 1896, and a verdict returned in favor of Knudson, the sheriff, finding the value of the property to be \$4,000. The jury also fixed the value of said possession of Knudson, sheriff, under his writs of attachment at \$1,510.29, that being the amount of the claim of Symns Grocery Company as disclosed by the evidence. Prior to this trial the claim of the United States National Bank had been assigned to H. A. Snow, the wife of E. H. Snow, and the claim of the bank under its attachment does not appear to have been tried or determined. Sometime afterwards Snow Brothers filed a motion to discharge the attachment of the Symns Grocery Company, as well also as a motion to set aside the verdict in favor of the sheriff under their attachment. November 12, 1896, both motions were sustained, and thereupon Snow Brothers prosecuted error to this court from the order of the district court dissolving their attachment, and upon a hearing in this court the order dissolving the attachment was reversed. See *Symns Grocery Co. v. Snow*, 58 Neb., 516.

The principal action was again tried at the June, 1900, term of the district court and resulted in a disagreement by the jury; a third trial was had at the December term, the jury returning a verdict for Julia M. Parker, the plain-

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tiff below, who had been substituted for S. A. Parker who had deceased in the meantime. Judgment was entered upon this verdict and the defendant has prosecuted error to this court.

Numerous assignments of error are urged and argued but as in our opinion the case will have to be reversed because the verdict is not supported by the evidence, it will be unnecessary to discuss any other question in the case. It clearly appears from the evidence that Samuel A. Parker, the mortgagee, was the uncle of Snow Brothers, they being sons of his sister. Relating to this phase of the case the court, in its second instruction, told the jury that, "It is admitted or clearly shown that Snow Brothers and the plaintiff were relatives. That being the case it devolves upon the plaintiff to clearly show by a preponderance of all the testimony the *bona fides* of the transaction had between them. In other words, the plaintiff must satisfy you by a preponderance of the testimony that at the time this chattel mortgage was executed Snow Brothers were indebted to him as claimed, and that the mortgage was given in good faith to secure the payment of such sum of money and without intent to cheat and defraud other creditors, and if you so find then your verdict should be for the plaintiff."

This undoubtedly states the rule which has long prevailed in this state. A careful examination of the record fails to disclose any evidence showing the *bona fides* of Parker's claim. It is true that Parker had in his possession, at the time he took his mortgage, notes of Snow Brothers amounting in the aggregate to the sum secured by the mortgage, but there is no evidence whatever to show that any consideration passed between him and Snow Brothers for these notes. So far as the record discloses these notes may have been manufactured for the occasion and issued without any consideration to support them. It is true that there is attached to the bill of exceptions what is termed the "first bill of exceptions," being the record presented to this court upon the former appeal

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taken by Symns Grocery Company from the order dissolving its writ of attachment and which contains some evidence relating to the consideration for the notes. This record was not, however, introduced in evidence in this case. The plaintiff in error used a small portion of it, extracts from the testimony given by Samuel A. Parker upon the first trial, to support his contention that the mortgage was fraudulent, but the bill of exceptions as a whole was not introduced in evidence and was not before the court or jury, and so far as we can see is no part of the record of the trial. The plaintiff, to sustain her petition, introduced the notes and mortgage, together with the evidence of one of the attorneys who had prepared the mortgage, showing the circumstances under which it was executed and then rested. No attempt was made to show any consideration for the notes which the mortgage was made to secure. It is an inflexible rule in this state, established in *Bartlett v. Checsbrough*, 23 Neb., 767, that "transactions between relatives, by reason of which strangers who have sold goods to some such relatives will be deprived of payment therefor, will be scrutinized very closely, and the good faith of the same must be clearly established."

For the reason that the plaintiff failed to show any consideration for the notes secured by the mortgage in controversy we recommend that the judgment of the district court be reversed and the case remanded for another trial.

AMES and ALBERT, CC., concur.

REVERSED AND REMANDED.

NOTE.—A rehearing was granted in the above case and an opinion on rehearing by SMOGWICK, J., filed October 7, 1903, vacating the judgment rendered therein and affirming that of the lower court. That opinion may be found reported in — Neb., —, 96 N. W. Rep., 1010.—REPORTER.

Meredith v. Lyon & Healy.

J. H. MEREDITH, APPELLEE, v. LYON & HEALY ET AL., APPELLANTS.

FILED OCTOBER 22, 1902. No. 11,014.

Commissioner's opinion. Department No. 1.

Chattel Mortgages: FAILURE TO RELEASE: CLAIM FOR PENALTY AS BASIS IN EQUITY TO CANCEL. A claim not reduced to judgment, for the statutory penalties for a failure to release paid chattel mortgages, does not furnish such a cross-demand as can be used for the basis of an equitable action to cancel another mortgage between the same parties which has not been paid.

APPEAL from the district court for Holt county. Tried below before KINKAID, J. *Reversed and dismissed.*

M. F. Harrington and Bartlett & Baldrige, for appellants.

H. M. Uttley, *contra*.

DAY, C.

This action was commenced in the district court of Holt county by J. H. Meredith against Lyon & Healy and H. C. McEvony, sheriff, to compel the cancellation of certain chattel mortgages and also to enjoin the defendants from taking the mortgaged property. In the lower court the plaintiff recovered judgment as prayed, to review which the defendants have brought the case to this court by appeal.

The facts necessary to an understanding of the question here presented are substantially as follows: In September, 1891, the plaintiff purchased a piano from Lyon & Healy at the agreed price of \$350. He paid \$100 in cash and for the balance of the purchase price, executed in favor of Lyon & Healy four promissory notes, three for \$60 each and one for \$70, due, respectively, on the 1st day of January, April, July and October, 1892. Each of the said notes contained a provision which rendered it a chattel mortgage upon the piano. Copies of these notes were

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duly filed in the office of the county clerk of Holt county, Nebraska, so that the record disclosed four chattel mortgages upon the piano, all executed the same day but maturing at different dates. The plaintiff paid the notes maturing in January and April and requested Lyon & Healy by letter to cancel and discharge the mortgages attached thereto. This request was not complied with. In August, the plaintiff again demanded a discharge of the mortgages included in the two notes which had not been paid and in this demand notified the defendants that unless it was complied with he would enforce the statutory penalty for a failure to cancel the mortgages upon the record. To this demand Lyon & Healy replied with some asperity, but declined to cancel the mortgages and notified the plaintiff that unless the note was paid by September 3, suit would be commenced to enforce payment. After the last note matured the plaintiff tendered to the attorney for Lyon & Healy, \$31.75, as the balance due upon the notes maturing in July and October. In arriving at this sum as the balance due upon the notes the plaintiff claimed a credit of \$100, due him as a penalty under the statute for the failure to release the mortgages upon his request. The tender was refused and thereupon Lyon & Healy commenced an action in the district court to replevy the piano and placed the writ in the hands of H. C. McEvony, sheriff, for execution. Before the writ was served, this action was commenced.

It is clear that to entitle the plaintiff to the relief he asks he must be credited as a set-off upon the notes with \$100, which he claims is due him as a penalty for the failure to release the mortgages which had been paid.

This claim is based upon section 15, chapter 32 of the Compiled Statutes, and in so far as it relates to the question now under consideration, is as follows: "Any mortgagee, assignee, or their legal personal representatives, after full performance of the conditions of the mortgage, who for space of ten (10) days after being requested shall refuse or neglect to discharge the same as provided in

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this section, shall be liable to the mortgagor, his heirs, or assigns in the sum of fifty (\$50) dollars damages; and also for all actual damages sustained by the mortgagor, occasioned by such neglect or refusal, said damages to be recovered in the proper action." It is plain, therefore, that by this action the plaintiff is endeavoring to recover the penalty prescribed by statute. The general rule is that a penalty can not be enforced in an action in equity. Pomeroy's Equity Jurisprudence [2d ed.], section 459, discussing the question of a court of equity enforcing forfeitures, says: "When will a court of equity by its decree actively enforce or carry into effect a forfeiture? The general answer to this question is easy and clear. It is a well settled and familiar doctrine that a court of equity will not interfere on behalf of the party entitled thereto and enforce a forfeiture, but will leave him to his legal remedies, if any, even though the case might be one in which no equitable relief would be given to the defaulting party against the forfeiture."

The plaintiff had a right of action against Lyon & Healy, based upon the statute, but this right of action does not constitute a proper set-off to the note. The question here is analogous to the rule announced in cases arising under the provisions of the acts of congress prescribing a penalty for the taking of usury, in which it is held, that usurious interest paid a national bank on a note, can not be applied by way of set-off or payment against the principal sum due in any suit by the bank upon such note. *Norfolk National Bank v. Schwenk*, 46 Neb., 381.

In *Broadnax v. Baker*, 94 N. Car., 675, 55 Am. Rep., 633, the court says: "One seeking equity must do equity and be content with full indemnity for actual loss sustained. * * * It is against the general principles of equity to aid in the enforcement of penalties or forfeitures." 2 Story, Equity Jurisprudence [13th ed.], sections 1319 and 1494; *Thompson v. New York & H. R. Co.*, 3 Sandf. Ch. [N. Y.], 625. The court in the North Carolina case was passing upon a petition for an injunction and the enforcement of penalties for a violation of statute,

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as was claimed, in derogation of plaintiff's exclusive franchise to maintain a ferry.

It is true that in *Lafayette County v. Hall*, 70 Miss., 678, 13 So. Rep., 39, the court holds that it was error where the trial court had jurisdiction to reform a bond and did so, to refuse to enforce it as to statutory penalties as well as damages. But this is on the ground that equity jurisdiction having attached on independent grounds the court should have given complete relief. *Clark v. Barnard*, 108 U. S., 436, 2 Sup. Ct. Rep., 878, is cited. This last was a suit in equity by assignees of a bankrupt railway company to recover a sum of money due on a certificate of indebtedness of the city of Boston which had been deposited with the state treasurer of Rhode Island to secure the completion of a railway which had not been built. The relief was refused and the money given to the state on the ground that it was not a security for the completion of the road but a penalty for its non-completion over which there was no jurisdiction in equity.

In Mississippi recently it has been held that bills to recover penalties for taking excessive freight will not lie in chancery; that there is no equity jurisdiction and the fact that the remedy is administered by the same court having jurisdiction at law makes no difference. *Mississippi Railroad Commission v. Gulf & S. I. R. Co.*, 78 Miss., 750, 29 So. Rep., 789.

The provision under consideration here is not a security against damage to the mortgagor. It is a penalty enacted by the state for a willful violation of his rights. It should be recovered by a judgment at law before it is sought to be made the foundation of equitable proceedings for the cancellation of the lien.

It is recommended that the decree of the district court be reversed and plaintiff's petition dismissed.

HASTINGS and KIRKPATRICK, CC., concur.

The judgment of the district court is reversed and plaintiff's petition dismissed.

REVERSED AND DISMISSED.

Shrake v. Laflin.

JOHN C. SHRAKE ET AL. V. WILLIAM LAFLIN.

HEYE J. MENSEN ET AL. V. WILLIAM LAFLIN.

FILED OCTOBER 23, 1902. Nos. 11,091, 11,092.

Commissioner's opinion. Department No. 1.

1. **Boundaries: SURVEYS: FIELD NOTES: EVIDENCE.** Evidence examined, and held to warrant a finding that a channel indicated by the field notes of an original survey as constituting the boundary line between parties could no longer be located by either natural or artificial landmarks.
2. **Boundaries: SURVEYS, REJECTION OF.** A survey will not be rejected merely because the county surveyor commenced the measurement of a line at its northern extremity, where that extremity is well ascertained, instead of going over it from the south as was done in the original survey.
3. **Boundaries: SURVEYS, REJECTION OF.** The identification of a section corner as a starting point, made by the county surveyor upon examination of the ground and upon sworn evidence, will not be rejected in the absence of any showing of mistake or error.
4. **Boundaries: SURVEYS: MEANDERING LINES: INSTRUCTIONS.** An instruction that the jury were to decide from the evidence whether or not certain meandering lines, located by the government surveyor, could be identified where such lines indicated the margin of a certain channel, does not substitute such meandered lines for the center of the channel as a boundary, where the jury are expressly told that, if they can locate such channel, its center is to serve as the boundary between the parties in the action.

ERRORS from the district court for Dawson county.
Tried below before SULLIVAN, J. *Affirmed.*

Warrington & Stewart and E. A. Cook, for plaintiffs in error.

Dryden & Main, contra.

DAY, C.

These actions present the same issues. Each is an ejectment suit brought by William Laflin in one case against John C. and Mary Shrake, and the other by the same plain-

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tiff against Heye J. Mensen and Anna Mensen. The plaintiff, Laffin, is a patentee, and the present owner of lots 9, 10 and 11, in section 6, township 8, range 19 west in Dawson county. The defendants are the owners of lots 5, 6, 7 and 8 in the same section. The matter in dispute is the boundary between plaintiff's lots 9, 10 and 11 and the defendants', which lie directly north of him. The plaintiff's lots 9, 10 and 11, were platted by the United States survey as forming an island in the Platte river, and the boundary was fixed as a meandering line along the channel separating this island from the north bank of the river. The south boundary of the defendants' lots was fixed as a meandering line on the north bank of the river, each party, of course, holding supposedly to the middle of the channel. As a matter of fact there is no such channel at the present time. There is a dispute in the testimony as to whether a trace of the old channel still exists; some of the witnesses affirm that there are such traces and some affirm that there is nothing to indicate that there was ever a channel across the section anywhere in the vicinity indicated by the government field notes. It seems clear that the government monuments, which according to those field notes once marked the meandered line on each side of this supposed channel, are no longer to be found.

The county surveyor of Phelps county made a survey in 1898, in which he abandoned the effort to locate this old channel by either natural or artificial marks. He measured the section lines on both the east and west sides of section 6 and found those lines varying considerably in length from that of the government survey. The northwest corner of section 6 seems to have been definitely located. It is also, of course, a township corner. The southwest corner of the same section is in the river and measurements were taken across the river over the bridge now standing there to the south side of section 7. The surveyor claims to have identified the southwest corner of section 7. The southeast corner of the same section

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is identified by the testimony of a resident and by established landmarks. The northeast corner of section 6, the surveyor also claims to have found, and to have measured the distance from that corner down to the river. Then starting at the southeast corner of section 7, he measured to the river bank and then by triangulation ascertained the distance from the south bank of the river to the point where he had found that the east line of section 6 came down to the north bank of the river and where he had left a stake. By this means he claims to have learned the length of the two lines forming respectively the west and east boundaries of sections 6 and 7. He seems to have located the meandered lines by taking proportionate parts of this distance and substituting them for the distances indicated in the field notes of the original survey.

After establishing in this way the starting point of the meandered lines on each side of the section he drew them through the section corresponding with the plat of the original survey, and then divided equally the space included between the two meandered lines which were thus assumed to constitute the respective north and south boundaries of the channel shown by the original survey. The result thus reached gives to each of the several claimants a quantity of land somewhat in excess of that allotted under the original survey and plat, for the reason, as above stated, that the length of the north and south lines of the two sections is found to be somewhat greater than that indicated in the original survey, and the space occupied by the river is now considerably less than that shown by said survey. The plaintiff brought this action to recover the land included between the boundaries thus located and an old fence, which the defendants claim was some years ago located by the parties as a boundary fence, and is to be taken as the true boundary. It appears clearly from the evidence that at the time this action was begun, the defendants held all north of the so-called old fence line. The evidence is undisputed as to the defendant, Mensen, that he and his grantors had so held for nearly fourteen years.

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Among the defenses urged is that of adverse possession. It does not seem necessary, however, to give such claim any extended consideration. Plaintiff acquired his title by homestead entry. His patent bears date of December 9, 1893. Just when this action was commenced does not appear, but plaintiff's amended petition was filed June 21, 1898, and there is nothing to indicate that plaintiff had been entitled to his patent for ten years previous to that time; in fact, his first settlement on the land, as testified to, was only eleven years prior to the trial in November, 1898. The claim of adverse possession could begin only when plaintiff became entitled to a patent. The burden of proof, however, is upon the plaintiff to establish his new boundary, as it clearly appears that possession under the old one had been held for at least seven years. The jury found in favor of plaintiff's contention. Both cases were decided upon the same evidence and the same errors are urged except that in the Shrake case, adverse possession by the defendant is not claimed.

The principal complaint of defendants is that plaintiff's evidence does not support this new boundary, nor the verdict which upheld that boundary. They say, truly enough, that if a channel corresponding substantially in location to that mentioned in the field notes of the United States survey can be found, that channel must be taken as the boundary, and this is true if its location does violence in some degree to the courses and distances shown in the original survey.

As before stated, the evidence is somewhat conflicting. Whether or not the channel can now be discovered, or the remains of one, seems to depend to some degree upon the sympathies and imagination of the observer. It is clear, however, that there is not now and has not been for a good many years, any such channel as the field notes indicate. In fact, the testimony now is that all the land in the section north of the old fence is cultivated and that the plaintiff is cultivating south of that fence and clear up to it. Plaintiff's island is evidently no longer an island.

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There is evidence which would amply warrant the jury in finding that the landmarks, natural and artificial, described as constituting the boundary between the holdings of these parties can no longer be identified or located.

The other objection urged by the defendants is that the survey made by P. O. Billings is unreliable and that the court erred in not striking out all the testimony in regard to it and especially as to the east line of the section. It is complained that Mr. Billings, as counsel say, "went at it backwards." That is to say, the original survey was made from the south. Mr. Billings started from the township corner and surveyed from the north across the bridge and to the point identified by him as the southwest corner of section 7. It is claimed that by these means he reached quite a different result from that of the government surveyor. It is true that Mr. Billings reached a different result as to the length of this west line from that of the government surveyor, but it is not believed to be in any way due to his commencing at the other end of that line to measure. Variations in lengths of courses between well known monuments from those found by a government surveyor are not uncommon. In this instance, it is the more to be expected because by reason of the location of the bridge upon the section line, Mr. Billings was able to make an actual measurement across the river, where the government surveyor undoubtedly used triangulation.

As to the east line, it is objected to because the starting point or southeast corner of section 7 was not sufficiently identified. It was taken on the testimony of Charles J. Nelson, who swore that he had seen the corner eighteen years before and that it was then plainly marked by four pits and a mound. It is complained that this is not sufficient identification, and that the ascertained length of the east line of section 6 is, therefore, unreliable. It is to be said that no evidence is introduced impeaching this corner as found by the surveyor, and there seems to be no reason in the record for refusing credit to Mr. Billings' ascertainment of the length of these lines. The critical

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question is whether the evidence does away with the north channel of the river which the United States surveyor located as the boundary between these parties. If that is done the distances and locations as established by Mr. Billings' survey are not impeached. As has been before suggested, the evidence seems to sufficiently justify the jury in their conclusion that this landmark not only can not now be found, but its location, if it ever did exist, can not be ascertained.

Error is also predicated of certain instructions which were given by the trial court. It is complained that those instructions, instead of telling the jury to look in the evidence for the channel which constituted the boundary, told them that the test for the location of the boundary was their ability to determine where the meandered lines of the channel were located, instead of the channel itself.

The jury were told by instruction No. 7, that the evidence tended to show that the channel originally separated the holdings of plaintiff from those of defendants; that the south line of defendants' holdings was its north margin "perpetuated by mounds, stakes and other means"; that plaintiff's north line was the south side of this channel "perpetuated in the same manner." The instruction continued as follows:

"If you believe from the evidence that there was a channel running from west to east through said section and that the lines of these tracts were established by the government surveyor in this way, then it is for you to say whether or not you can tell from the evidence with a reasonable degree of certainty where these lines as then established now are, and whether the tract in dispute lies south of the north line of lots 9, 10 and 11 as then established, or whether the tract in dispute lies north of the south line as then established of lots 5, 6, 7 and 8; and if plaintiff has established by a preponderance of the evidence that said tract in dispute lies south of the north line of lots 9, 10 and 11, then you will find for the plaintiff.

"And further, if you believe from the evidence that lines

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were established as hereinbefore referred to by the government surveyor, but from the evidence you can not with a reasonable degree of certainty determine where said lines, if any, as then located now are, and if the plaintiff has established by a preponderance of the evidence that said lines have become obliterated and lost and that no evidence of the same as they were perpetuated by the government surveyor remains and that no other evidence of the same exists, and that by observing the lines surveyed by the witness Billings, and the county surveyor Gift, the parties to this suit would each receive approximately and as near as may be the amount of land called for by their patents, then it would be your duty to find for the plaintiff. But if the plaintiff has not established these facts by a preponderance of the evidence, then it would be your duty to find for the defendant."

Of course, it can not be successfully contended that the meandered lines were the boundaries of the parties, and the testimony introduced by plaintiff shows that his claim is to the center of the tract originally located as the channel. The instruction quoted in making it necessary for the plaintiff to prove that the disputed land claimed by him was altogether south of the meandered line seems to put an additional burden upon the plaintiff rather than upon the defendants. The requirement, that the evidences of the meandered lines must have become lost or obliterated before resorting to courses and distances and especially to quantities of land conveyed, would seem to be sound and correct.

Doubtless, it is true that the meandered lines are run, as counsel say, in order to ascertain the number of acres in the tract for the purposes of sale, and it is doubtless true, that the real boundary is the channel and not the meandered line along the margin of the channel, but the channel itself is that by which the meandered line is established. The channel itself is the evidence of the location of those lands. As long as that channel can be identified and located it would seem clear that the meandered

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boundaries could also, and so far as there is any hardship in these instructions it would seem to lie wholly upon the plaintiff in requiring him to stay within his own quantity of land in his recovery in case the boundary can not be located and quantities have to be resorted to in determining the division.

The jury were expressly told that if they found that at the time the government survey was made a channel ran through section 6, whose margins were located by meandered lines, and since that time the channel had become filled up, then they should take the center of such channel as the boundary line.

It is not believed that there was any misapprehension on the part of the jury of the fact that they were to ascertain if they could where the original channel, taken as a boundary, was located and place the dividing line at its center. And if they were unable to locate it the land was to be divided by courses, distances and quantities in accordance with the original survey as nearly as could be ascertained.

It is therefore recommended that the judgments of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

WALTER J. LAMB, APPELLANT AND CROSS-APPELLEE, V.
HENRY H. WILSON ET AL., APPELLEES AND CROSS-APPELLANTS.

FILED OCTOBER 22, 1902. No. 11,483.

Commissioner's opinion. Department No. 1.

1. Partnership: DISSOLUTION: COMPENSATION FOR WINDING UP AFFAIRS.

It is a general rule that neither partner of a dissolved firm is entitled to compensation for services rendered in winding up partnership affairs, unless it is expressly agreed otherwise or can be fairly implied from the circumstances.

2. Partnership: DISSOLUTION: CONTINUANCE OF BUSINESS: COMPENSATION. Where, however, a subsisting partnership upon equal terms

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dissolves, and it appears that time, skill and labor have been expended by a partner in the continuance of the partnership business, which inures to the general benefit, such partner should receive a reasonable compensation for the profits resulting to all from his extra labor and skill, based upon the nature of the business, the difficulties attending the undertaking, and the value of the results attained.

3. **Partnership: DISSOLUTION: SUBSEQUENT BUSINESS: COMPENSATION: ATTORNEYS.** A law firm of three members, each sharing equally in the profits, dissolved, assigning undisposed of cases to the several members, except one case, pending in the supreme court, which was not assigned. Judgment therein was reversed, and a retrial was conducted by two of the members of the old firm, who prosecuted the case to a successful termination and collected the fee. *Held*, The value of the services rendered by the old firm in the former trial and by the two members in the second trial respectively being ascertained, and the fee collected insufficient to pay both sums, the fee should be distributed *pro rata* between the dissolved firm and the two members.
4. **Partnership: LAW FIRM: DISSOLUTION: SUBSEQUENT TRIAL OF CASES BY MEMBERS.** Where a law firm dissolves, assigning undisposed of cases to the several members, and the agreement of dissolution is supported by sufficient consideration, each member who in good faith undertakes to carry out his part of the agreement is entitled to prosecute to completion the cases assigned to him, and services rendered by other members to him in such cases will be held to be gratuitous.
5. **Partnership: LAW FIRM: DISSOLUTION: SUBSEQUENT TRIAL OF CASES UNDER NEW CONTRACT.** Where a law firm dissolves, and one of the members is subsequently employed under a new contract by a client of the old firm in a case commenced before dissolution, and which has been assigned to such member, a settlement made between the members of fees due to the firm in such case, made with knowledge of such subsequent employment, will be held to have been made in view of such employment, and will not be opened.

APPEAL from the district court for Lancaster county.
Tried below before FROST, J. *Reversed with directions.*

W. J. Lamb, for appellant.

Ricketts & Wilson, contra.

DAY, C.

This action was brought in the district court for Lancaster county by Walter J. Lamb against Arnott C. Rick-

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etts and H. H. Wilson for an accounting and settlement of the partnership business of Lamb, Ricketts & Wilson. The issues tendered by the pleadings will sufficiently appear in the further discussion of the case. The trial resulted in a judgment in favor of the defendants and against the plaintiff for \$415.66, to review which the plaintiff has brought the case to this court by appeal. The defendants filed a cross-appeal asking a modification of certain findings of the trial court and praying that the amount of the judgment be increased to correspond with the modified findings prayed for.

The record shows that in November, 1882, the plaintiff and the defendants entered into a partnership upon equal terms to engage in the practice of law in the city of Lincoln, Nebraska, under the firm name of Lamb, Ricketts & Wilson. The partnership so continued until November 28, 1892, when it was dissolved by mutual consent and apparently with the best of feeling existing between the parties. At the time of the dissolution all the money on hand and all other property belonging to the firm was equally divided between the partners. The firm appears to have been very successful and at the time of this dissolution had on hand a number of cases pending in the state and federal courts, in some of which fees were contingent upon their successful termination. In some of the cases a large amount of work had been performed, others had been tried and submitted, while in others, scarcely anything had been done. At the time of the dissolution a list of the firm's cases was prepared and by mutual agreement were assigned to the different members to close up for the firm, the division being based somewhat on the fact that the case had been particularly in charge of the member to whom it was assigned. There were a few cases pending in the supreme court which had been briefed, argued and submitted, and most of these were not assigned.

It appears that the firm had been employed by Mrs. Houston to prosecute a case in her behalf against one Gran and others, and that a contract had been made with her

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to prosecute the case to final determination upon a contingent fee of $37\frac{1}{2}$ per cent. of whatever money might be recovered. At the date of the dissolution this case had been tried in the district court and from a judgment for \$100 in favor of Mrs. Houston, she had prosecuted error to the supreme court where the case had been briefed and submitted and was pending a decision. There is a conflict in the evidence as to whether this case was assigned to any member of the firm to close up. Mr. Lamb swears that the case was assigned to Mr. Ricketts, while Mr. Ricketts and Mr. Wilson both testify that no assignment of this case was made to anyone. It seems that a fair preponderance of the evidence establishes that no assignment of this case was made. After the dissolution of the firm the Houston case was reversed in the supreme court and upon a retrial in the district court, conducted by Ricketts & Wilson, a judgment was recovered for the plaintiff for \$5,000, which amount, after considerable further litigation, was collected and the sum of \$2,147.06 was retained under the contract as fees.

It also appears that during the existence of the partnership and from time to time for a considerable period thereafter, settlements were made between the partners as to the amount each had drawn out from the profits of the business, so that on January 1, 1895, each member had drawn from the firm's business an equal amount. During the existence of the firm the books were kept under the immediate supervision of Mr. Wilson, and after the dissolution the firm's books were turned over to him and each member of the firm reported to him the fees collected. It is shown that after January 1, 1895, the fees reported to Mr. Wilson, exclusive of the fees in the Houston case, amounted to \$2,128; of this amount, \$575.40 had been drawn out by Mr. Lamb, to which should be added \$22, which it is conceded he subsequently received, making Mr. Lamb's total \$597.40. Mr. Ricketts drew out \$526.50 and Mr. Wilson \$526.30.

One of the questions presented by the record is whether

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Ricketts & Wilson are entitled to receive a reasonable compensation for their services in closing up the Houston case as against the old firm. As bearing upon this question, the trial court found as a matter of fact, that the reasonable value of the services performed by Ricketts & Wilson in the Houston case after it was reversed by the supreme court was \$2,000, and that the reasonable value of the services performed by the old firm in said case was \$350. Upon these facts the court held "That out of the \$2,147.06 received by the defendants for the prosecution of the claim of Mary J. Houston, \$350 thereof belongs to the old firm of Lamb, Ricketts & Wilson, and that said firm of Ricketts & Wilson must account to said old firm for said amount."

The rule of law is well settled by the weight of authorities that neither partner of a dissolved firm is entitled to compensation for services rendered in winding up the partnership affairs unless it is expressly agreed otherwise or can be fairly implied from the circumstances. It seems, however, that the rule should not be extended beyond the requirement of merely winding up the partnership affairs by collecting its outstanding claims, paying debts and distributing the surplus among the members, and that when it appears that time, skill and labor have been expended by a partner in the continuance of a partnership business which inures to the general benefit, he ought to receive from the profits from his skill and labor, a reasonable compensation varying according to the nature of the business, the difficulties and results of the undertaking and its necessity or desirability. While few cases are found which directly support this view, it seems to us to be founded upon the plainest principles of equity and justice, especially when applied to partnerships among professional men where the profits are almost wholly the result of professional skill and labor.

This exception to the general rule is suggested, but not decided, in *Denver v. Roane*, 99 U. S., 355, wherein Justice Strong, after stating the rule that the winding up of a

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partnership by a survivor is gratuitous, says: "There may possibly be some reason for applying a different rule to cases of winding up partnerships between lawyers and other professional men where the profits of the firm are the result solely of professional skill and labor."

In *Cameron v. Francisco*, 26 Ohio St., 190, a surviving partner had continued the business—the publication of a newspaper—and thus by his services preserved the valuable good-will which otherwise would have been lost, and by so doing was enabled to sell the business as a going concern. It was held "That the amount thus saved to the firm from the good-will is in the nature of profits, and that, on the settlement of the partnership, an allowance should be made therefrom to the surviving partners for the services in continuing the business after the dissolution."

In *Schenkl v. Dana*, 118 Mass., 236, after stating the general rule, it is said: "Under the general rule above stated all that can be required of the surviving partner is that he proceed to wind up the partnership and account with the legal representative of the deceased partner. In the absence of any agreement, he is entitled to no pay for his personal services in the strict discharge of this duty. But if, with the assent of the administrator of the deceased partner, he employs extra labor to finish existing contracts; if he enters upon new contracts, employing the machinery, patents and property of the firm therein; then, to the extent of his personal services devoted to such extra work, he is entitled to compensation."

In *Maynard v. Richards*, 46 N. E. Rep. [Ill.], 1138, it is said: "But the rule that a surviving partner is entitled to no extra compensation applies to his services in winding up the partnership. The winding up or settling of the partnership affairs after the death of one of the partners may be said to consist, as a general thing, in selling the property, receiving moneys due the firm, paying the firm debts and the advancement of the partners, returning the capital contributed by each partner, and dividing the

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profits. Where, however, the surviving partner renders services in excess of the mere winding up of the partnership affairs, he will, under certain circumstances, be entitled to compensation for such excess."

It seems to us that the services performed by Ricketts & Wilson in closing up the Houston case are clearly distinguishable from the mere winding up of the partnership affairs within the meaning of that term as it is used in the books. The skill and labor performed by them in that case made the firm's contract valuable. We think, therefore, that they were entitled to compensation for services in that case out of the profits created by their skill and labor.

The next question which is suggested is how the funds should be divided, where, as in this case, the amount of the fees under the contract is less than the reasonable value of the combined services of the old and new firm. The proofs show that the services of the old firm were worth \$350, and the services of Ricketts & Wilson were worth \$2,000, while the amount collected under the contract was \$2,147.06.

It is contended by Ricketts & Wilson that from the fees so received should first be deducted the value of their services, and the remainder credited to the old firm. It seems to us, however, that the fees received should be divided between the old and the new firm *pro rata* with the value of the services which each rendered in producing it. It cannot be said that because the first judgment was set aside that, therefore, the services of the old firm were valueless. Upon this basis the old firm is entitled to receive out of the Houston fee, \$319.76, and the balance, \$1,827.30, should go to the firm of Ricketts & Wilson.

The record also shows that in the assignment of cases to the several members for the purpose of closing them up, that the cases of Maynard against Hecht, and the Chattanooga Foundry and Pipe Company against Orleans, were assigned to the plaintiff. It appears, however, that the defendants were not satisfied with the progress which

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the plaintiff, was making in this case and that they voluntarily took hold and closed the business up. The court found that the defendants were entitled to receive the sum of \$60 as against the old firm for services rendered in Maynard against Hecht and the sum of \$425 in the Chattanooga Pipe Foundry case. It seems clear to us that for these services the defendants are not entitled to recover. By agreement, supported by sufficient consideration, these cases were assigned to Mr. Lamb to close up. No proof is offered that he was not in good faith carrying out his part of the agreement and when the defendants offered to and did assist him in closing them up their services should be regarded as gratuitous. We think, therefore, the court was in error in allowing the defendants to recover for services in these two cases.

As before stated, the amount received by the old firm exclusive of the Houston claim was \$2,128, to which should be added the fee of \$319.76 belonging to the old firm in the Houston case, making a total of \$2,447.76. The books of the firm as kept by Mr. Wilson show that Mr. Lamb drew out of the firm \$575.40, to which should be added the item of \$22, which it is admitted he received. Of the amount charged to Mr. Lamb on the books it is shown that \$300 thereof was not in fact paid to him but was charged to him on the books by reason of the fact that that amount had been realized and retained by Lamb as commissions on the sale of the judgment in the Chattanooga case. This charge was made on the books without the knowledge or consent of Mr. Lamb. Upon this branch of the case, Wilson testified as follows: "Excluding that \$300, Mr. Lamb's account would be \$275.40, of that amount \$100 did not go into the actual bank account of the firm, but when we agreed finally with Mr. Lamb that the firm should receive that \$300 for the release of the attorney's lien on the Chattanooga judgment in the federal court, he gave his personal check to Mr. Ricketts for \$100 and to me for \$100 and retained \$100, and these three items were all charged against the several members, so it would be wholly imma-

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terial whether it went out entirely or remained in entirety." The testimony also shows in this connection that there were two items of \$300 each considered, that the item divided was not the commission item in the sale of the judgment but was an item for fees that was paid at the time that Ricketts & Wilson discharged the attorney's lien.

In further explanation it might be said that the Chattanooga Company employed Mr. Lamb personally to close up its business and that fact was communicated to the other members of the firm.

It also appears that in July, 1895, Lamb wrote a letter to Ricketts & Wilson, in which, among other things, the item of the commission for the selling of the judgment was mentioned. The contents of this letter led to some communications between the plaintiff and the defendants as to a settlement of the question of fees to be charged by the firm against the Chattanooga company. A settlement was finally agreed upon, and on September 24, 1895, the defendants executed to the plaintiff a receipt as follows:

"LINCOLN, NEB., Sept. 24, 1895.

"Received of W. J. Lamb \$200, being in full for all fees and costs collected and charged by Lamb, Ricketts & Wilson against the Chattanooga Foundry & Pipe Works.

"RICKETTS & WILSON."

This settlement was made with full knowledge of the claim which was being urged by Lamb that the commissions claimed by him were earned under a separate employment and after the old firm's services had been dispensed with. There is no claim that the settlement was not so understood. We see nothing in the testimony which warrants us in opening up this settlement. It would seem, therefore, that the old firm should be credited with fees to the amount of \$2,447.76, out of which each member is entitled to receive \$815.92. Mr. Lamb having received of this amount but \$297.40 is still entitled to draw from the old firm \$518.52.

We therefore recommend that the judgment of the dis-

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strict court be reversed and that a judgment be entered in favor of the plaintiff, and against the defendants, for \$518.52.

HASTINGS and KIRKPATRICK, CC., concur.

The judgment of the district court is reversed with directions to enter a judgment in favor of the plaintiff, and against the defendants, for \$518.52.

REVERSED WITH DIRECTIONS.

Opinion on rehearing follows.

WALTER J. LAMB, APPELLANT AND CROSS-APPELLEE, V.
HENRY H. WILSON ET AL., APPELLEES AND CROSS-APPELLANTS.

FILED NOVEMBER 5, 1903. No. 11,483.

Commissioner's opinion. Department No. 1.

1. **Partnership: DISSOLUTION: COMPENSATION FOR WINDING UP AFFAIRS: CONTRACTS.** In the absence of a contract between partners touching the nature or amount of services to be rendered by each in the prosecution of the common enterprise, one partner is not entitled to compensation for extra attention, labor or services devoted to the partnership business, but by agreement with his associates he may become so entitled.
2. **Partnership: DISSOLUTION: MUTUAL CONTRACTS: CONSIDERATION.** Mutual promises afford a consideration for each other sufficient to constitute a binding contract between the parties making them, to do the things promised.
3. **Attorney and Client: EXTENT OF EMPLOYMENT: PARTNERSHIP.** In the absence of stipulations evidencing a different intent, an employment of an attorney to prosecute a claim to a recovery, terminates with the rendition of a judgment thereon and the exhaustion of the usual legal process upon the judgment. It does not include the prosecution of subsequent actions and proceedings to reach the property of the judgment debtor, or to enforce liability against his sureties upon supersedeas.

REHEARING of case reported *ante*, page 496.

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APPEAL from the district court for Lancaster county. Tried below before FROST, J. *Judgment below reversed with directions.*

Walter J. Lamb and Robert Ryan, for appellant.

Ricketts & Wilson, contra.

AMES, C.

This is a rehearing from a former decision of this court. *Lamb v. Wilson, ante*, page 496, 92 N. W. Rep., 167. The statement of facts there published will not be repeated or supplemented, except incidentally, in the course of the following discussion. Although it is alleged in both the petition and answer that the copartnership of Lamb, Ricketts & Wilson was dissolved on the 28th day of November, 1892, that assertion is distinctly denied by other allegations of the pleadings, by the evidence and by the findings of the trial court. What was in fact done on that day was the division of the tangible property of the firm, and the release of the individual members from partnership obligations with respect to their future acquired business, and the entry into a new agreement for the continuation of the partnership relation with respect to the larger part of the uncompleted business of which the firm was then in possession and in the course of transaction. The fourth finding of fact by the trial court which is acquiesced in by all parties upon this appeal, is in the following language:

"Upon the dissolution of said firm on November 28, 1892, by a mutual agreement the members of said firm apportioned among themselves all of the cases then in the hands of said firm that had not been finally disposed of, except such cases as had already been briefed, argued and submitted in the supreme court of Nebraska, each member of said firm then and there agreeing to look after and try the several cases assigned and apportioned to him

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in consideration of the other members looking after and trying the cases that had been assigned and apportioned to them respectively."

That this was an agreement which the parties were competent to enter into, is not questioned, nor do we think there can be any doubt about its binding force. It is elementary that mutual promises are a consideration for each other sufficient to constitute a contract between the parties making them, to do the things promised. 1 Parsons, Contracts [8th ed.], section IX, bottom paging, 464-468. No reason is urged nor, we think, successfully can be, why this agreement with respect to the services to which it had reference, was not as obligatory upon the parties to it, as though they had not previously been partners, or the business which it concerned had not belonged to the partnership. That an express agreement of a like kind might have been made as a part of the partnership agreement, and that in such case it would have been enforceable, or damages would have been recoverable for its breach, we think there can be no doubt. It would have been like any other agreement to contribute a specified amount or degree of money, skill or labor, as capital or otherwise, for the prosecution of the common undertaking. The occasion for making the agreement, in this instance, was the contemplated dissolution of the partnership and the winding up of its affairs, and this occasion would have furnished an additional consideration, if one had been needed, for the agreement itself.

When, therefore, Ricketts & Wilson begun and prosecuted the litigation in the matter of the Chattanooga Foundry & Pipe Company against Orleans, they contributed to the common enterprise, with the knowledge and consent of Lamb, valuable services, which Lamb was lawfully bound to contribute himself. There is nothing in the record to indicate that any of the parties supposed such contribution to be gratuitous, and, in view of their legal rights and liabilities under the agreement, there is no presumption to that effect. Neither does it appear to

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us correct to say that such services were rendered voluntarily. The retainer for the litigation was a valuable asset of the firm which Ricketts & Wilson were entitled to have realized upon in the only way in which it could be done, namely, by the performance of the required service and, besides this, they as well as Lamb, were individually as well as jointly liable for any damages that might have become recoverable for a breach of the contract of retainer. When, therefore, they had collected their fee and charged it to themselves upon the partnership account, they were entitled to charge Lamb thereon with a like amount for services rendered in his behalf and for his benefit. With respect to the item of \$300 obtained by Lamb upon the sale of the judgment in favor of the Foundry & Pipe Company, the district court found in effect, that it was not paid to him as a brokerage commission for making the sale, but was a method by which he collected so much for the services of the firm in the litigation. Such being the case he became, for the reasons above stated, indebted to Ricketts & Wilson for the whole thereof. Like considerations apply to the fee of \$60 received by Ricketts & Wilson for services in the case of Maynard against Hecht. Lamb should be charged, as of course, with the \$22 admittedly received by him of funds belonging to the firm and not charged to him upon its accounts. With respect to the fee of \$260 in the case of Ormsby against Parker, Ricketts & Wilson appear to have acquiesced in its retention by Lamb, without its being entered upon the company accounts, for no less than six years and may fairly be presumed to have relinquished all claims to share in it.

The remaining inquiry in the case is with respect to the litigation in and growing out of the case of *Houston v. Gran*, 38 Neb., 687, which was pending in this court at the time the agreement for winding up the affairs of the firm was entered into, and concerning which no stipulation between the parties was made at that time or afterwards.

In our view, above expressed, that the partnership was

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not at any time dissolved or terminated with respect to pending business, the authorities cited in the former opinion and in the briefs and arguments of counsel touching the rights and obligations of surviving and continuing partners after dissolution by death or otherwise, are not in point, but it is important to determine what was the extent of the service contracted for between Mrs. Houston and the firm and when the employment ended. These matters are defined by the first paragraph of the written contract of employment which is in the following form and is unambiguous:

"This agreement made and entered into this 15th day of November, 1889, by and between Lamb, Ricketts & Wilson and Mary J. Houston is such that the party of the second part hereby retains Lamb, Ricketts & Wilson as attorneys to bring suit on behalf of herself and her children against Thomas Carr and his saloon bondsmen, or the person or persons conducting the Carr saloon on the north side of the square in the city of Lincoln during the month of March, 1889, to recover damages for the loss of services and want of support from her husband caused by liquor purchased at the above named saloon, and also for the death of her husband, James Houston, by being run over by the B. & M. railroad, occasioned by the intoxication of the said Houston upon liquor purchased at the Carr saloon in the city of Lincoln in the month of March, 1889."

Clearly this language contemplates nothing more or further than the prosecution of an action to judgment and execution against the saloon keeper and his bondsmen. It is true that subsequent paragraphs of the agreement obligate the attorneys to bring and prosecute such a suit or suits as in their judgment should be necessary to recover for the death of the husband, and for the loss of support by the widow and children, but we do not think that these provisions operated, or were intended, to enlarge the scope or nature of the employment which was

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fully described in the above quoted paragraph, or to obligate the attorneys to begin and prosecute the unanticipated proceedings for the appraisal and setting aside of the homestead right of one of the judgment debtors, nor the prosecution of an action upon a supersedeas bond thereafter given by the defendants in the prosecution of a petition in error in this court, nor of an action to obtain subrogation to and to foreclose a mortgage executed by one of the judgment defendants to indemnify his sureties upon the supersedeas bond. When the final judgment against the saloon keeper and his sureties had been recovered in the district court and affirmed by this court, and an unavailing execution had been issued thereon, the plaintiffs therein and the attorneys became the owners respectively of five-eighths and three-eighths of that judgment, and the contract of employment had been kept and fulfilled. Whatever additional suits or proceedings were necessary to be prosecuted, and were prosecuted for the purpose of rendering available and collecting this judgment, were for the joint benefit of all, and at the reasonable expense of all in proportion to their respective interests. For the rendition of this service the plaintiffs were not bound to employ the members of the former law firm, or any of them, nor were they or any of them bound to render such service gratuitously or in consideration of the interest which they had already earned and acquired in the judgment. After having rendered this service Ricketts & Wilson accepted a lump sum of \$2,147.06, in compensation therefor and for a release of the interest of the firm in the judgment. That they had authority to make such release in good faith and for a consideration, is not disputed, and their good faith is not impugned. What remained to be done, and what remains for the court to do, is to deduct from the sum so received the reasonable value of their services and disbursements in the conduct of the litigation subsequent to the execution on the judgment, and to account to the firm for the residue thereof. Neither findings nor evidence sufficient to enable the court

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to make such an apportionment upon this appeal, can be found in the record.

It is therefore recommended that the former judgment of this court be vacated and set aside and that the judgment of the district court be reversed and the case remanded for a restatement of the account between the parties in compliance with this opinion and the entry of a judgment accordingly.

HASTINGS and OLDHAM, CC., concur.

The judgment heretofore rendered by this court is vacated and set aside, the judgment of the district court reversed and the cause remanded for a restatement of the account between the parties in compliance with this opinion and a judgment to be entered accordingly.

JUDGMENT BELOW REVERSED WITH DIRECTIONS.

NOTE.—January 21, 1904, an opinion, PER CURIAM, was filed overruling the motions on file asking for a second rehearing in the above cause. The opinion modifies the former opinions, however, by directing the district court "to hear such additional evidence as may be requisite for a complete statement of the accounts between the parties, and restate such accounts and render judgment accordingly, in accordance with the law as stated in the syllabus of the opinion upon the last hearing, without regard to the findings of fact or distribution of items and partial statement of accounts contained in said opinion." This opinion is reported in 98 N. W. Rep., 37.—REPORTER.

LOUISA WOLFF, APPELLANT, v. GOODWIN W. PHELPS ET AL.,
APPELLEES.

FILED OCTOBER 22, 1902. No. 11,488.

Commissioner's opinion. Department No. 1.

1. **Mortgages: FORECLOSURE: DEFICIENCY JUDGMENT: REPEAL OF STATUTES.** The court has jurisdiction to enter a personal deficiency judgment in actions of foreclosure which were pending prior to the repeal of sections 847 and 849 of the Code of Civil Procedure.

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2. **Mortgages: FORECLOSURE: DEFICIENCY JUDGMENT, APPLICATION FOR: STATUTES.** Under the provisions of section 848 of the Code of Civil Procedure, a motion and application for deficiency judgment is properly overruled when a foreclosure proceeding commenced prior thereto remains undisposed of.

APPEAL from the district court for Colfax county. Tried below before MARSHALL, J. *Affirmed.*

George H. Thomas, for appellant.

Everett & Wertz, contra.

KIRKPATRICK, C.

This is an appeal from an order of the district court of Colfax county, denying a deficiency judgment in a foreclosure proceeding brought by Louisa Wolff, on August 29, 1895. Appellant Louisa Wolff, commenced a proceeding against Goodwin W. Phelps, and others to foreclose a mortgage. On December 7, 1895, a default was entered which appears upon the journal of the court in the language following: "Now on this 7th day of December, A. D., 1895, this cause came on for hearing and trial to the court, and the defendants, Oweda Phelps, Goodwin W. Phelps, Charles J. Phelps, and Edwin A. Phelps, having failed to answer or demur, were each three times called in open court, but came not, and thereby made default; and default is hereby entered against them. In consideration whereof the court finds that there is due the plaintiff from the defendants the sum of \$882.87, which said amount draws interest at the rate of 10 per cent. per annum, and the sheriff is hereby ordered to advertise and sell said premises according to law in default of payment for twenty days."

A stay was taken, and on September 14, 1896, an order of sale was issued, and thereafter return was made that the property was not sold for want of bidders. On January 20, 1899, a second order of sale was issued. The property was sold, and on March 3, 1899, the sale was duly

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confirmed. On the 20th day of March, 1899, a petition for a deficiency judgment was filed, and an order made by the district court requiring defendants to show cause within ten days why judgment should not be entered as prayed. Due service of this order seems to have been made upon Charles J. Phelps and Edwin A. Phelps, and the latter on June 17, 1899, filed objections to a deficiency judgment, alleging that the district court had no jurisdiction to enter a deficiency judgment, and that the petition failed to state facts entitling plaintiff to any relief. On the 28th day of December, 1899, the matter of a deficiency judgment came on for hearing in the district court and an order was made denying the deficiency judgment in the language following: "Now, on this day this cause came on for hearing upon motion of plaintiff for deficiency judgment, and the court after hearing arguments of counsel and being fully advised in the premises, denies the same, to which holding and ruling of the court the plaintiff at the time duly excepted, and is allowed forty days in which to prepare and serve a bill of exceptions."

On the 18th day of June, 1900, the journal entry just quoted was amended to read as follows: "Now, on this 28th day of December, 1899, this cause came on for hearing on the motion and application of plaintiff for a deficiency judgment against the defendants, Goodwin W. Phelps, Oweda Phelps, Charles J. Phelps, and Edwin A. Phelps, and was submitted to the court, and hereon and upon the objections thereto of the defendant Edwin A. Phelps, on consideration whereof the court doth find and say: 1st. That the original petition herein is sufficient to support a personal deficiency judgment against said defendants and each of them, and the second, third and fourth paragraphs of said objection are, therefore, overruled; but the court further finding that it hath no jurisdiction to render and enter a personal deficiency judgment in this action by reason of the repeal of the statutes heretofore existing authorizing such entry; it is, therefore, ordered and considered that said plaintiff's motion and

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application be and the same is hereby overruled and denied, and said application dismissed. To which holding and ruling of the said court the plaintiff duly excepted and is awarded forty days from the rising of the court to prepare and serve a bill of exceptions."

From the decisions of this court in *Hanscom v. Meyer*, 61 Neb., 798, 86 N. W. Rep., 381; *Thompson v. West*, 59 Neb., 677; *Patrick v. National Bank of Commerce*, 63 Neb., 200, 88 N. W. Rep., 183, it is clear that the learned trial court was in error in the view that it had no right to enter a deficiency judgment because of the repeal of sections 847 and 849 of the Code. (Chapter 95, page 378, Laws, 1897.) But it is also clear that the action taken by the trial court on December 7, 1895, as disclosed by the journal entry, does not amount to a decree of foreclosure. If a decree of foreclosure was in fact pronounced by the court at that time, and the clerk failed to make it a matter of record, in a proper proceeding and upon due notice to the defendants therein, the trial court has an undoubted right to cause to be entered a judgment *nunc pro tunc*; but until this be done, no decree of foreclosure of the mortgage upon which suit was brought is in existence. Section 848 of the Code as it existed at the time this foreclosure proceeding was commenced is in the language following: "After such petition shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless ordered by the court."

The application for a deficiency judgment in this case, having been made after the commencement of the proceedings to foreclose, and before any final disposition had been made of such proceedings, was properly denied by the trial court. There seems to be no error in the judgment of the trial court, and it is therefore recommended that the same be affirmed.

HASTINGS and DAY, CC., concur.

· AFFIRMED.

Waddell v. Gage County.

SHANNON W. WADDELL ET AL., APPELLEES, v. THE COUNTY OF GAGE, IN THE STATE OF NEBRASKA, ET AL., APPELLANTS.

ELIZABETH C. LA SELLE, APPELLEE, v. THE COUNTY OF GAGE, IN THE STATE OF NEBRASKA, ET AL., APPELLANTS.

ELIZABETH C. LA SELLE, APPELLEE, v. THE COUNTY OF GAGE, IN THE STATE OF NEBRASKA, ET AL., APPELLANTS.

EDWARD E. SNYDER ET AL., APPELLEES, v. THE COUNTY OF GAGE, IN THE STATE OF NEBRASKA, ET AL., APPELLANTS.

FILED OCTOBER 22, 1902. Nos. 11,615, 11,616, 11,731, 11,732.

Commissioner's opinion. Department No. 3.

Taxation: SPECIAL ASSESSMENTS: CANCELLATION: NOTICE.

APPEALS from the district court for Gage county. Tried below before LETTON and STULL, JJ. *Affirmed.*

Albertus H. Kidd and L. M. Pemberton, for appellants.

George A. Murphy, William C. Dorsey and Orlando Swain, *contra.*

DUFFIE, C.

The appellees in the four cases above entitled brought their actions in the district court of Gage county to have certain special paving and grading taxes assessed against their property in the city of Beatrice declared void and to cancel the same.

The facts in these cases are identical with those in *Cook v. Gage County*, 65 Neb., 611, 91 N. W. Rep., 559, and for the reasons there given we recommend that the judgments of the district court be each affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

Logan v. Nebraska Moline Plow Co.

JOHN S. LOGAN, TRUSTEE IN BANKRUPTCY OF MINNIE E. STONER, ET AL. V. NEBRASKA MOLINE PLOW COMPANY.

FILED OCTOBER 22, 1902. No. 11,903.

Commissioner's opinion. Department No. 1.

Bankruptcy: CONTRACT OF CONDITIONAL SALE: UNRECORDED: CONSTRUCTION OF STATUTES. The federal bankruptcy law giving to the trustee the title to all property which the bankrupt could have transferred prior to the filing of the petition or which could have been levied upon for his debts, places the trustee as against an unrecorded conditional sale contract in the position of a judgment creditor.

ERROR from the district court for Adams county. Tried below before ADAMS, J. *Reversed.*

James H. McIntosh, for plaintiffs in error; *Tibbets Bros. & Morey*, of counsel.

Section 67a of the federal bankruptcy law, which provides that "claims which for want of record or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate," clearly defeats the plow company's claim. If the plow company's claim is construed as a chattel mortgage then it was not valid as against the claims of creditors of Stoner because it was not recorded. *Farmers & Merchants Bank of York v. Anthony*, 39 Neb., 343; *Spaulding v. Johnson*, 48 Neb., 830; *Meyer & Raapke v. Miller*, 51 Neb., 620. If the contract was one of conditional sale, the title to remain in the plow company until the purchase money was paid, it was invalid for the same reason. Compiled Statutes, chapter 32, section 26; *Peter-son v. Tufts*, 34 Neb., 8. The bankruptcy law of 1867 did not contain section 67a of the present law, therefore unrecorded liens or rights were valid as between the claimant and the assignee in bankruptcy, or the general creditors. *Stewart v. Platt*, 101 U. S., 731; *Yeatman v. Savings In-stitution*, 95 U. S., 764. Section 67a was adopted to

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remedy the evil of fostering secret liens that was an outgrowth of the old law. The decisions construing section 67a are all adverse to the plow company's claim. *In re Legg*, 96 Fed. Rep., 326; *In re Adams*, 97 Fed. Rep., 188; *In re Booth's Estate*, 98 Fed. Rep., 975.

Section 70a of the bankruptcy law sequesters the property in favor, and on behalf, of the creditors as of the date of filing the petition, giving the trustee, and through him the creditors, all the rights the bankrupt could have given, or the creditors could, by legal process, have acquired. Section 67a relates to right; section 70a relates to title. In respect to title, two things are important, viz.: when does the title vest in the trustee, and to what property does the trustee take title? Clearly the property vests in the trustee "as of the date he was adjudged a bankrupt." As to the property to which the trustee takes title, section 70a says, the trustee shall take title to all property which, prior to filing the petition, the bankrupt could by any means have transferred, or which might have been levied upon or sold under judicial process against him. The decisions of the federal courts sustain these views. *In re Hammond*, 98 Fed. Rep., 845, 860; *In re Barrow*, 98 Fed. Rep., 582; *In re Gutwillig*, 90 Fed. Rep., 475, 480; *In re Pekin Plow Co.*, 112 Fed. Rep., 308.

"The effect of the institution of such proceeding is to forthwith sequester and appropriate all the property of the bankrupt to the payment of his debts *pro rata* and equally. * * * The institution of proceedings in bankruptcy amounts to an effectual sequestration for the benefit of all his creditors of all the property of the bankrupt. * * * By such a proceeding the creditors 'are using the courts of law and their processes for the collection of their debts,' and the creditors thereby make an effectual seizure of the property of the bankrupt within the true meaning of the decisions of the supreme court of Nebraska [construing recording statute], hereinbefore referred to." *In re Pekin Plow Company*, 112 Fed. Rep., 308. "It is as true of the present law as it was of that of 1867,

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that the filing of the petition is a *caveat* to all the world, and in effect an attachment and injunction." *Mueller v. Nugent*, 184 U. S., 1. See also *Bryan v. Bernheimer*, 181 U. S., 188; *White v. Schloerb*, 178 U. S., 542; *In re Rabenau*, 118 Fed. Rep., 471.

There is no distinction between voluntary and involuntary proceedings in bankruptcy so far as the questions involved herein are concerned. *Missouri Moline Plow Co. v. Spilman*, 117 Fed. Rep., 746.

O'Neill and Gilbert, for defendant in error.

The estate possessed by Mrs. Stoner in these goods was merely a right to hold and to sell and to turn the proceeds over to the plow company. Title was never in her but was at all times in the plow company, and if the trustee took only the estate which Mrs. Stoner had in the goods conditionally sold he took but a bare right of possession, accompanied by a right to sell, but also accompanied and burdened with the duty of turning over to the plow company the proceeds of such sale. Technically the vendee had an unreserved power to sell the goods prior to the filing of the petition in bankruptcy, but in reality she did not have such power. She could sell the goods in the usual course of trade and give a good title, because it was agreed that the title to the money received for the goods sold should remain in the vendor as well as the title to the goods not sold. This is not a sale within the meaning of section 70a of the bankruptcy act. Neither had the vendee such power to sell as is contemplated in the entire act unless the failure to record the contract of sale as provided by our state statute gave him that power in certain cases included within section 67a of the bankruptcy act, namely, to purchasers in good faith without notice.

Section 70a of the bankruptcy act gives trustee no greater title than his bankrupt had. "Except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the

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disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens, or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt. * * * He takes the property in the same 'plight and condition' that the bankrupt held it. *Winsor v. McClellan*, 2 Story [U. S.], 492." *Yeatman v. Savings Institution*, 95 U. S., 764. See also *Stewart v. Platt*, 101 U. S., 731, for same holding. Unless changed by section 67a of the present bankruptcy act the above rule, which was adopted in the construction of the act of 1867, is still in force and the decisions of the courts under the present act are practically unanimous that such change has not been made. *Chattanooga National Bank v. Rome Iron Co.*, 4 Am. Bank. Rep., 441; *In re Kellogg*, 112 Fed. Rep., 52; *In re New York Economical Printing Co.*, 110 Fed. Rep., 514; *In re McKay*, 1 Am. Bank. Rep., 292. The case of *In re Hammond*, 98 Fed. Rep., 845-860, cited by plaintiffs in error and the other Massachusetts cases of *Lowe v. Welch*, 139 Mass., 33; *Grant v. Lyman*, 4 Met. [Mass.], 470, 473, and *Sibley v. Quinsigamond National Bank*, 133 Mass., at page 523, upon which the Hammond case is based, are not adverse to our contention. Under the holding in the Hammond case, *supra*, the trustee in bankruptcy, under section 70a of the act, takes no greater title than the bankrupt had, and in no case takes greater title than the bankrupt had except in special cases provided for by section 67a where the claims of creditors are invalid for want of record. Applying this holding to the case at bar the trustee could take no property interest in the goods replevied in this action for the reason that, first,—the bankrupt had only a naked right to possess and to sell the goods and was bound to hold the proceeds for the benefit of the plow company, and second,—because the claim of the plow company was not invalid for want of record against creditors generally, but only as against purchasers in good faith and judgment and attaching creditors without notice.

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Section 67a of the bankruptcy act gives no greater property in the goods of the bankrupt than the bankrupt himself had.

The object of section 26, chapter 32, Compiled Statutes, was not to change the rights of the parties to a contract, but "to protect innocent purchasers and creditors." *McCormick v. Stevenson*, 13 Neb., 70; *Peterson v. Tufts*, 34 Neb., 8; *Osborne v. Plano Mfg. Company*, 51 Neb., 602. It thus becomes apparent that the want of record of the contract of conditional sale involved herein would not have invalidated it as against the claims of "creditors" of the vendee. It would have invalidated it, if at all, only as against purchasers and judgment and attaching creditors without notice. These are not "creditors" in the sense in which the word is used in section 67a of the bankruptcy act. Wherever courts have held that the trustee takes title as against a conditional vendor, the statutes of the states in which the cases were decided, without exception, have provided that such contracts, unless recorded, were void as to creditors generally or as to all persons except the parties to the contract. Just such statutes were in force where *In re Legg*, 96 Fed. Rep., 326; *In re Adams*, 97 Fed. Rep., at page 189, and *In re Booth's Estate*, 98 Fed. Rep., 975, cited by plaintiffs in error, originated. The statute applies only to such as come within its description. *In re Hinsdale*, 111 Fed. Rep., 502; *Singer Manufacturing Company v. Nash*, 70 Vt., 434; *In re Sewell*, 111 Fed. Rep., 791.

In re New York Economical Printing Co., 110 Fed. Rep., 514, and *In re Pekin Plow Co.*, 112 Fed. Rep., 308, cited and relied upon by plaintiffs in error, are irreconcilably opposed to each other unless a distinction in the application of the rule contended for may be made between voluntary and involuntary proceedings in bankruptcy. The former case was one in voluntary bankruptcy and the latter in involuntary. A creditor has not the right to oppose an adjudication in voluntary bankruptcy, while in involuntary proceedings he has that right given to him by

section 18b of the act itself. *In re Ives*, 113 Fed. Rep., 911. So the creditors in a voluntary proceeding can not be "using the courts of law and their processes in the collection of their debts," and are not within the description of the statute governing the filing of contracts of conditional sale.

DAY, C.

The material facts in this case are undisputed, and in so far as they are necessary to an understanding of the discussion are substantially as follows: In 1896, the Moline Plow Company entered into a contract with Minnie E. Stoner, which provided, among other things, as follows:

"It is expressly agreed that all bills are to be settled for by note on receipt of goods or upon monthly balances at the option of second party; and all goods ordered hereafter for this season's trade will be subject to the same conditions as to time and manner of payment as those herein ordered. * * *

"Second party agrees that the title to and the ownership of all implements which may be shipped as herein provided shall remain in the party of the first part and their proceeds in case of sale shall be the property of the Nebraska Moline Plow Company and subject to their order until full payment shall have been made for the goods by second party to the satisfaction of the first party; but nothing in this clause to release second party from making payment as aforesaid.

"If the purchaser under this contract fails or becomes insolvent, or any member of the purchaser's firm fails or becomes insolvent or dies; all accounts or notes for goods bought under this contract, including renewal notes in whose hands soever said notes may be, shall then become due and payable whether the notes be given in payment for goods or accounts or collateral security thereto."

Pursuant to this contract certain implements were delivered to the vendee, and in March, 1897, notes were ex-

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cuted by her in favor of the vendor for the amount of the price. The notes by their terms became due in October, 1890. On September 3, 1890, the vendee filed a petition of voluntary bankruptcy. On September 6, the plow company instituted this action to replevy the goods still in the possession of vendee and took them. A few days later the vendee was duly adjudged a bankrupt and one J. S. Logan was appointed trustee in bankruptcy. The trustee intervened and claimed the goods replevied by the plaintiff as the property of the bankrupt estate. Upon the trial a finding in favor of the plaintiff was entered upon which judgment was rendered. To review this judgment, the intervener has brought the case to this court on proceedings in error.

Our statute provides that such contract is void as against purchasers in good faith and judgment creditors. Compiled Statutes, chapter 32, section 11. The bankruptcy law, section 67a, provides that claims which for want of record are not valid against creditors shall not be valid against the bankrupt estate.

Section 70 of the bankruptcy law provides that the trustee shall be vested with the title of the bankrupt "as of the date he was adjudged a bankrupt * * * to all * * * property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

These three statutory provisions are claimed by him to give the trustee title to the goods in question and to entitle him to their return or a judgment for their value. The finding and judgment of the trial court in favor of the plow company are therefore alleged to be wrong.

It is claimed by the plow company that these provisions taken together do not give the trustee title to these goods; that the lien given by the conditional sale contract was valid as against all but purchasers for value without notice and judgment creditors and that the trustee does not come under either category and, therefore, section 67a of the bankruptcy law does not apply. The plow com-

pany also claims that section 70 only gives the trustee such title as the bankrupt had at the "date he was adjudged a bankrupt" together with the title and right to vindicate it against property transferred in fraud of creditors.

Of course, the real question here is whether or not the provision in subdivision 5 of section 70a in the bankruptcy act, vesting the trustee with all the title which the bankrupt could, prior to the filing of the petition, have transferred or which could have been levied upon for his debts, places the trustee in the position of a judgment creditor as of the date of the filing of a petition in bankruptcy by the debtor.

By its naked terms it seems to do so. This property certainly could have been levied upon at that time by one who had taken out process. The language seems to have been used with an express intention to give the trustee the rights of a levying creditor and have such rights relate back to the time of filing the petition. The careful reservation of rights of purchasers for value, in subdivision *e* of this section 70, and in subdivision *f* of section 67, seems a further indication of such intention.

In support of plaintiff in error's contention, we are cited to the case of *In re Pekin Plow Company*, 112 Fed. Rep., 308. In that case a contract providing that the goods sold should be held as collateral security and in trust for the vendor, was held to be a chattel mortgage, and, not being of record, to be void as to a trustee in an involuntary bankruptcy. No distinction is suggested between a voluntary and an involuntary bankruptcy, and the reasons given by the court for holding the one a sequestration of property seem to apply equally to the other.

The reasoning of the federal court with regard to the holding of this court in *Farmers & Merchants Bank of York v. Anthony*, 39 Neb., 348, that only creditors who are using the courts could complain, would, of course, not apply to a proceeding inaugurated by the debtor. At all events, until notice was ordered on an adjudication the creditors

could not be held to be "using the courts of law and their processes for the collection of their debts." The involuntary bankruptcy petition would be of itself such a proceeding by at least three creditors on behalf of all. The voluntary petition would not be by a creditor and would not necessarily set forth any facts which would warrant any appeal to the courts on the part of creditors. The title, however, and rights of the trustee rest upon the federal statute and its terms. These are in no respect different in a case of voluntary bankruptcy from that of an involuntary one. The provisions of section 67a and of section 70 apply to both alike, and if the trustee in one case has the rights of a levying creditor it is hard to see how he can fail to have them in the other.

It is true that the case of the *Pekin Plow Company*, above, is diametrically opposed to that of *In re New York Economical Printing Company*, 110 Fed. Rep., 514. In the latter case the trustee was held to have no rights as against an unrecorded mortgage. The same two sections of the law relied upon here were urged in that case. The court, however, says that the intention of the law was to give the trustee in bankruptcy the bankrupt's rights and no more, and it was held that the terms of sections 67a and 70 of the bankruptcy law ought not to be extended to cases not clearly within them. The case, however, is prior to that of the *Pekin Plow Company* and from another circuit. Like the *Pekin Plow Company* case, it indicates no distinction between the trustee's rights in voluntary and in involuntary cases. As before suggested, while both come under the same provisions of the law, it is difficult to show such distinctions. The same statute ought to give the same right to the trustees in both cases.

The contention of the plow company that there was no judgment creditor at the time of the filing of the bankruptcy petition, and so nobody who could have levied, and that no transfer would have been good unless to a grantee in good faith, who does not exist in this case, and therefore, this is not property which Mrs. Stoner could

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have transferred or which could, in fact, have been levied upon seems to us to have great force. It was, however, equally available in the *Pekin Plow Company* case and is, therefore, overruled by that decision.

The argument from the general intention of the law merely to transfer to the trustee such title as the bankrupt has and such as the trustee is subrogated to from the various creditors and to preserve to the latter all existing liens is also just as strong in one kind of bankruptcy as in another, and is also overruled in the *Pekin Plow Company* case, although only adverted to incidentally in saying that the rights of the trustee are not the same as those of the assignee under the 1867 act.

We are cited by the plow company to some Massachusetts cases construing a state assignment law very similar to the federal statute. These decisions give the trustee no rights against unrecorded liens. The decisions are strongly based upon the general intention of the statute. We should be inclined to follow them if the federal court of this circuit had not held otherwise. Until the federal supreme court changes the rule laid down in the *Pekin Plow Company* case, we suppose that in this circuit, at least, the filing of a petition in bankruptcy is a sequestration of the property that might have been levied upon by process against the debtor at that time except as against purchasers for value without notice. It should be noted that the *Pekin Plow Company* case was decided since the finding of the trial court in this case.

It is, therefore, recommended that the judgment of the district court be reversed and the cause remanded.

HASTINGS and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

Opinion on rehearing follows.

Logan v. Nebraska Moline Plow Co.

JOHN S. LOGAN, TRUSTEE IN BANKRUPTCY OF MINNIE E.
STONER, ET AL. V. NEBRASKA MOLINE PLOW COMPANY.

FILED MARCH 18, 1903. No. 11,903.

Commissioner's opinion. Department No. 3.

Bankruptcy: CONTRACT OF CONDITIONAL SALE: PETITION IN BANKRUPTCY: EFFECT. As against a conditional vendor of chattels, the filing of a petition in bankruptcy by or against the vendee has the effect of the seizure of the goods upon judicial process against the latter.

REHEARING of case reported *ante*, page 516.

ERROR from the district court for Adams county. Tried below before ADAMS, J. *Former judgment of reversal adhered to.*

James H. McIntosh, for plaintiffs in error.

O'Neill & Gilbert, *contra*.

For extracts from briefs see *ante*, pages 516-521.

AMES, C.

This is a rehearing granted from a former decision reported *ante*, page 516, 92 N. W. Rep., 129, where the facts are sufficiently stated. The case has been exhaustively rebriefed and reargued with the effect to confirm in our minds the belief that the former decision is right. Nothing would be gained by repeating or recapitulating the arguments contained in that decision. It may suffice to say that they are fortified by more recent decisions of the courts of the United States to whom is committed authority for the ultimate interpretation of the laws of congress. It is admitted that if the goods in controversy had been seized by a creditor of Mrs. Stoner by ordinary judicial process, such creditor would thus have acquired a right to them superior to that of the defendant in error. In *Mueller v. Nugent*, 184 U. S., 1, the supreme court of the

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United States has held, subsequently to the announcement of the former decision, that "the filing of a petition in bankruptcy is a *caveat* to all the world, and in effect, an attachment and injunction." And in *In re Rabenau*, 118 Fed. Rep., 471, Judge Phillips of the United States court for the western district of Missouri held that a trustee in bankruptcy stands in the same position as creditors of the estate pursuing the goods under legal process and is entitled to claim them as against a vendor by a conditional sale. And in *Missouri Moline Plow Company v. Spilman*, 117 Fed. Rep., 746, the beginning of a proceeding in bankruptcy was held to be a sequestration of the bankrupt's property so as to extinguish the title of a conditional vendor of chattels under circumstances similar to those in the case at bar. To the same effect is *In re Hammond*, 98 Fed. Rep., 845, in which the precise question now at issue is discussed at some length by Judge Lowell. In none of these cases is any discrimination attempted, in this respect, between voluntary and involuntary proceedings nor do we think any good reason has been suggested why any should be. In view of these decisions we are of opinion that the construction of the bankruptcy act, in this regard, ought to be considered as judicially settled, irrespective of whether, if unrestrained by authority, we should have reached the same or a different conclusion.

It is therefore recommended that the former decision of this court be adhered to and the judgment of the district court reversed and the cause remanded for a new trial.

ALBERT and DUFFIE, CC., concur.

FORMER JUDGMENT OF REVERSAL ADHERED TO.

Russell v. Anderson.

**MALINDA RUSSELL, APPELLANT, V. IDA C. ANDERSON ET AL,
APPELLEES.**

FILED OCTOBER 22, 1902. No. 11,965.

Commissioner's opinion. Department No. 3.

Appeal and Error: BRIEFS, ERRORS NOT DISCUSSED IN. This court will not search the record for errors that are not pointed out by counsel and discussed in the brief.

APPEAL from the district court for Otoe county. Tried below before FAWCETT, J. *Affirmed.*

John C. Watson, for appellant.

Hayden & Wilson, contra.

DUFFIE, C.

Malinda Russell is one of the heirs at law of Lewis C. Anderson who departed this life April 2, 1894. Prior to his death he had conveyed to another daughter, Ida C. Anderson, certain real estate owned by him in consideration of said Ida C. agreeing to care for and support the grantor and his wife, Ruth Anderson, for the term of their natural lives. It is alleged that this conveyance was procured by threats, persuasions and duress of the said Ida C. Anderson and that she failed to carry out her agreement.

One Ramold, who took a conveyance from Ida C. Anderson, is also made a party and it is charged he purchased the land with knowledge of the fraud and duress by which Ida C. Anderson obtained title. Ida C. Anderson and Ramold filed separate answers, the statements of which, if true, constitute a complete defense to the action. Among other matters pleaded in defense by Ida C. Anderson is a former adjudication. Upon the final hearing the plaintiff's bill was dismissed, the court finding that all the defenses set up in the answer of Ida C. Anderson were established by the evidence.

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The brief of the appellant consists of a copy of the petition, the answers of Ida C. Anderson and Ramold, the replies thereto, together with the following statement: "The correctness of the judgment rendered on the pleadings and the proof is the only question to be considered. We can not condense the testimony of the witnesses as detailed at the trial and scattered as it is through the bill of exceptions, and if we fully produce it in print nothing in time would be gained; but the court must verify the correctness of our printed version by reading the entire bill of exceptions itself. The court erred in rendering a decree for the appellees. We therefore submit that under the pleadings and the evidence as introduced at the trial the appellant should have had judgment and a decree, and should in this court."

Nowhere is our attention directed to any evidence which it is claimed supports the plaintiff's bill; but we are directed to examine the evidence and ascertain for ourselves if that is not the case. Conceding that that would be our duty in case no other question was involved than the sufficiency of the evidence to support the decree, there is another question in the case and on which the court found in favor of the defendants, namely, a former adjudication. This presents a legal proposition upon which we think we are entitled to the assistance of counsel. It is not claimed that the former action pleaded by the defendant did not fully cover the issues raised in this case. It is not denied that in the former action a decree went in favor of the defendant and that such a decree is not now in full force. If the plea of former adjudication is not good, if the issues made in the former case were not within those embraced in the case at bar, counsel should have pointed out wherein the difference lies and have assisted us by his brief in an examination of that question. We can not with the great mass of business before us devote our time to an examination of questions which it is the duty of counsel to investigate and we must adhere to the rule that until some specific error is pointed out by counsel

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for appellant we are not required to search the record for errors which may possibly exist.

We recommend that the decree appealed from be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

HANNAH R. DILLON, APPELLEE, v. JOHN C. WATSON ET AL,
APPELLANTS.

FILED OCTOBER 22, 1902. No. 11,984.

92 NW 156
Commissioner's opinion. Department No. 2.

1. **Contracts: CONSTRUCTION: COURT AND JURY, PROVINCE OF.** Although the construction of instruments is for the court, where a written contract requires extrinsic evidence to explain its terms, the interpretation to be given in view of such evidence is a question of fact.
2. **Attorney and Client: EMPLOYMENT OF ATTORNEY BY ATTORNEY: LIABILITY OF CLIENT.** A client is not liable for fees of other counsel employed by those whom he has retained to conduct his case unless he authorizes or ratifies such employment.
3. **Attorney and Client: ASSISTANT COUNSEL IN OTHER COUNTY: LIABILITY OF CLIENT FOR FEES.** But an attorney retained to conduct a case which is pending in another county, may properly employ local counsel to attend to necessary formal matters, such as procuring orders, attending calls of the docket, and the like, and charge the fees paid such counsel as expenses, where it appears that the fees paid were less, or at least not more, than the expense which would have been incurred had he gone in person.
4. **Frauds, Statute of: WAIVER: BROKERS.** Whether a defendant who has not pleaded the statute and permits evidence of an oral agreement employing an agent to sell land to be introduced without objection does not thereby waive the provisions of section 74, chapter 73, Compiled Statutes, *quare*.
5. **Contracts: ATTORNEY AND CLIENT.** Certain findings of fact held to be supported by the evidence.

APPEAL from the district court for Otoe county. Tried below before JESSEN, J. *Modified and affirmed.*

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Robert Ryan, for appellants.*E. F. Warren* and *L. F. Jackson*, contra.

POUND, C.

This suit involves an accounting between attorneys and client. The trial court allowed a great part of the items charged by the defendants, but rejected several, so that each side has appealed. The items rejected, to which we shall first direct our attention, have been grouped by counsel under four heads; services in the defense of plaintiff's son in a criminal prosecution; services in a foreclosure proceeding; services in the collection of rents; and services connected with the sale of certain property. The first class of items involves the construction of a written contract between the parties. This contract was made after a preliminary examination had been had, and on the face thereof it is not entirely clear whether compensation for services at that hearing were meant to be included in its terms or not. Ordinarily, the construction of instruments is for the court. But where a written contract requires extrinsic evidence to explain its terms, the interpretation to be given in view of the circumstances attending execution of the contract and the extrinsic evidence is a question of fact. *Coquillard v. Hovey*, 23 Neb., 622; *Rosenthal v. Ogden*, 50 Neb., 218; *Meyer v. Shamp*, 51 Neb., 424. The trial court found that services at the preliminary examination were included in the agreement, and such finding is not without support in the contract and the circumstances disclosed in evidence. The other items connected with the criminal proceeding, relate to expenses in procuring a change of venue. The contract provided that one of the attorneys was to procure such change of venue at his own expense, and hence the sums charged were properly disallowed.

The second class of items comprise two charges for sums paid to counsel in a foreclosure suit and certain expenses connected with a transfer of the property in controversy.

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We are somewhat reluctant to take up these items separately because review of the record as a whole leads us to suspect that they were rejected more because a somewhat liberal fee had been allowed for legal services in the suit than because the charges in themselves were improper. But there is an express finding that these items were improperly charged, and we have no course open but to review it upon the evidence relating to them. It appears that the suit had been removed to the federal court, which sat in other counties than that in which the parties resided, and that the defendants on several occasions paid small sums to local counsel at points where the court was sitting for attending to formal matters connected with the progress of the litigation. It is no doubt true that a client is not liable for fees of other counsel employed by those whom he has retained to conduct his case to assist therein unless he authorizes or ratifies such employment. *Sedgwick v. Bliss*, 23 Neb., 617. But where a case is pending in another county, it frequently happens that orders have to be obtained, leave of court taken in matters of course, and calls of docket attended, which do not require personal attention of counsel familiar with the cause but may be left to one person as well as to another. Expense is necessarily involved whether counsel retained by the party go in person or whether local counsel are employed to act for them. If the latter course is taken and the fees paid are less, or at least not more, than the expense necessarily involved in going in person, we see no reason why the sums thus expended are not as properly chargeable to the client as the traveling and other expenses would have been. It is in evidence that the fees paid in this case were less than the expense of attending the courts in person, and we think the items should be allowed. With respect to the other items under this head, there seems to be no dispute that the sums charged were actually expended, and as they were paid out in the course of the client's business in a proceeding which she authorized and approved, we can find no warrant for rejecting them.

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The third class of items is made up of interest on a note and commission on certain rents collected. There was an express contract not to charge commissions, but this seems to have referred to rents collected to satisfy a note given defendants by plaintiff, and charge is made for rents collected in excess of the amount thereof. Upon this branch of the case, the trial court seems to have taken the view that as defendants had considerable sums of money belonging to their client in their hands for some time, the interest upon the one claim would offset that upon the other, and that as the collection of the rents was for the benefit of each, since they were in large part applied upon indebtedness due the defendants, in the absence of an agreement therefor, there should be no allowance for commissions. We think this view was warranted under all the circumstances.

The last group of charges relates to commissions claimed by reason of an oral employment to procure a purchaser for certain real property. The defendant insists that these commissions were not recoverable by reason of section 74, chapter 73, Compiled Statutes. The reply does not set up the statute, and evidence as to the oral agreement was admitted without objection. Under such circumstances it becomes a serious question whether a party who has made no attempt to take advantage of the provision referred to should not be held to have waived it. The words of the statute are almost identical with those of the statute of frauds, and there would be much reason for applying the same rules to each. But the plaintiff in her evidence denied the alleged employment, and we need not decide as to the effect of the statute in view of the finding of the trial court.

The plaintiff appeals from the allowance of fees in the foreclosure suit, claiming that the amount thereof is excessive. The fee allowed is a liberal one, but in view of all the circumstances, we think the court did justice to both parties. There is evidence to sustain the finding, and we do not think it should be disturbed.

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We therefore recommend that the decree be modified by reducing the amount of plaintiff's recovery to \$536, and that, so modified, it be affirmed, each party to pay his own costs in this court.

BARNES and OLDHAM, CC., concur.

The judgment of the district court is modified by reducing the amount of plaintiff's recovery to the sum of \$536, and, so modified, it is affirmed. It is further ordered that each party pay his own costs in this court.

MODIFIED AND AFFIRMED.

MARSHALL S. ELDER ET AL. V. JACOB C. WEBBER.

FILED OCTOBER 22, 1902. No. 12,036.

Commissioner's opinion. Department No. 1.

1. Quietting Title: PLEADING: REPLY, NEW CAUSE OF ACTION IN. Where a petition alleges facts showing that the legal title to the premises is in plaintiff, and that defendant is asserting title to the premises adverse to plaintiff under a deed from a stranger, a reply which alleges that plaintiff joined in a deed from defendant's grantor, but by express agreement the premises were to be held in trust for plaintiff, introduces a new cause of action.
2. Pleading: REPLY, NEW CAUSE OF ACTION IN: JOINDER OF ISSUE. While it is not the province of a reply to introduce a new cause of action, yet if all parties and the trial court treat the issue presented by the reply as if it were regularly and formally joined, the case will be so considered in the appellate court.
3. Quietting Title: TRUST, EXPRESS: EVIDENCE. Evidence examined, and held not to support the finding of the trial court that the land was held by defendant under an express trust.
4. Quietting Title: TRUST, EXPRESS: VALIDITY: STATUTES. Under the provisions of section 3, chapter 32, Compiled Statutes, an express trust in real estate is unenforceable unless reduced to writing.
5. Quietting Title: TRUST, RESULTING: EVIDENCE. Evidence examined, and held insufficient to establish a resulting trust.

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ERROR from the district court for Clay county. Tried below before STUBBS, J. *Reversed.*

Thomas H. Matters, for plaintiffs in error.

Hurd & Spanogle, contra.

DAY, C.

Jacob C. Webber brought this suit in the district court for Clay county, Nebraska, against Marshall S. Elder and others, heirs of John M. Elder, deceased, praying that the title to the southwest quarter of section 1, township 5 north of range 8 west of the 6th P. M. be quieted and confirmed in the plaintiff. The plaintiff alleged in his petition that on July 20, 1875, he became the owner of the above described premises by purchase from the St. Joseph & Grand Island Railway Company; that said lands were conveyed to him by a deed from said company which was duly recorded in Clay county, Nebraska; that immediately after the purchase the plaintiff took possession of said land and has ever since said purchase been in actual possession thereof; that on December 24, 1885, John M. Elder, now deceased, with full knowledge of plaintiff's rights, obtained a deed for said premises from one John M. Ragan for an alleged consideration of \$2,850, and that the defendants, heirs of said John M. Elder, deceased, now claim title to said premises against the plaintiff by virtue of said deed.

The defendants denied the allegations of the petition save and except certain admissions not necessary to be here enumerated, and by way of further defense alleged that on or about December 1, 1885, the plaintiff was heavily in debt and had a mortgage on the above described premises, together with the northeast quarter of section 12 in township 6 north of range 8 west, in Clay county, Nebraska; that said mortgage had been foreclosed in the federal court, a sale had been had and all the premises purchased by one Samuel M. McCue; that the purchase

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price paid was just sufficient to pay the debt, interest and costs, and left no surplus to be paid the plaintiff; that John M. Ragan, for the purpose of gain and speculation, purchased from the plaintiff his equity of redemption in said lands on December 2, 1885, and took from said plaintiff a conveyance of said lands and redeemed the same from the foreclosure sale, and thereafter the said Ragan sold and conveyed the said lands now in controversy, being a part of the lands covered by the mortgage to John M. Elder, now deceased; that in this conveyance the plaintiff joined the said Ragan as grantor, the purchase price to the said Ragan being about \$500 above the price he had paid for the land. As a part of the same transaction the said John M. Elder mortgaged the said lands, together with other land including his homestead, for the purpose of paying the purchase price of said land, to John M. Ragan and that said mortgages have since been paid except the sum of about \$650; that said Webber has never made any claim to said premises adverse to the defendants.

By the reply the plaintiff alleged that on December 3, 1885, by an agreement between the plaintiff and John M. Ragan, the plaintiff, for an alleged consideration of \$2,850, executed to said Ragan a quit-claim deed to said premises, and that on January 12, 1886, the plaintiff joined with said Ragan and wife in a deed to John M. Elder to the premises now in controversy and also a deed to John S. Elder for the northeast quarter of section 12; that it was then and there agreed between the plaintiff and John M. Elder and John M. Ragan that John M. Elder should hold the property conveyed in trust for this plaintiff: that the property conveyed to John S. Elder should be first sold and the plaintiff given credit for the amount upon the indebtedness that he was owing upon said premises, and that the rents derived from the lands should be applied in discharging the said indebtedness; that in December, 1890, the land deeded to John S. Elder was sold for the consideration of \$3,200; that John M. Elder never had possession of said premises and never claimed to own the same.

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Upon the trial the court found generally for the plaintiff and against the defendants, and also found that at the time of the conveyance from said Ragan and the plaintiff to John M. Elder and John S. Elder, it was agreed that John M. Elder should hold the land now in controversy in trust for the plaintiff, and entered judgment accordingly. To review this judgment the defendants have brought the case to this court on error.

One of the errors assigned and now relied upon is that the finding of the court that the land in question was held by John M. Elder, deceased, in trust for the plaintiff is not sustained by any evidence. It is clear that by the reply the plaintiff has sought to state an entirely different cause of action than is alleged in his petition. The petition is a simple suit to quiet title and alleges facts showing that the legal title to the premises is in the plaintiff and that the defendants are asserting some title adverse to the plaintiff under a deed executed by one John M. Ragan. By the reply it is alleged that the plaintiff joined in the deed executed by Ragan under which the defendants now claim title, but it is alleged there was an express agreement at the time that the premises were to be held in trust for the plaintiff. The petition seeks to quiet the title; the reply to have a trust declared. The allegations of the reply are entirely inconsistent with the cause of action set out in the petition. There is no testimony supporting the allegations of the petition. The plaintiff's testimony shows that he voluntarily parted with his title by executing a deed to Ragan and that he was paid therefor. It is true there is an allegation in the petition of possession for a period of years longer than the statute of limitations but no attempt was made to base the plaintiff's right on his adverse possession. The plaintiff's case was attempted to be made upon the allegations of the reply that an express trust had been created.

It is a general rule that the plaintiff can recover only on the cause of action stated in his petition. It is not the province of a reply to introduce a new cause of action.

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School District of the City of Hastings v. Caldwell, 16 Neb., 68; *Piper v. Woolman*, 43 Neb., 280; *Wigton v. Smith*, 46 Neb., 461. In view of the fact that the court as well as the parties tried the case upon the theory presented by the reply we will consider the case as though this issue was presented in the regular manner.

It is alleged that there is no evidence to support the findings of the court that at the time of executing the deed by Ragan and the plaintiff to John M. Elder, that it was agreed that said John M. Elder should hold the property in trust for the plaintiff. The testimony of the plaintiff is very clear that at the time of the transfer no agreement was made that the property was to be held in trust for him. Upon this branch of the case he testified as follows: "State if there was any agreement with them to sell it? There was no agreement. What was the agreement in Mr. Ragan's office as to what should be done? There was nothing said in Mr. Ragan's office as to what was to be done." Mr. Ragan testified that at the time the Elders were negotiating with him for the property that one of them said that "they wanted to provide a home for the old man as long as he lived."

In our opinion, there is an absolute failure to show an express trust. None of the witnesses claim that the alleged agreement was in writing. Section 3, chapter 32 of the Compiled Statutes, provides that, "No estate or interest in land other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned or surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same." If it be granted that the testimony shows that such an agreement was made as alleged it would be unenforceable because not in writing. *Cameron v. Nelson*, 57 Neb., 381; *Thomas v. Churchill*, 48 Neb., 266.

There is testimony which tends to show that it was un-

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derstood that plaintiff was to be cared for and have a home on the land during his lifetime, but this testimony falls far short of creating a trust in the land. In our opinion, there is no testimony in the record sustaining the findings of the court that by agreement of the parties the property in question was to be held in trust for the plaintiff.

Counsel for plaintiff argues at some length that the facts established are sufficient to show a resulting trust. We are unable to agree with this contention. The plaintiff had transferred the legal title to the land to Ragan, and Ragan's deed to Elder would have carried the title without the plaintiff joining in the deed. The plaintiff did not furnish or contribute anything toward the purchase of the land. The plaintiff's theory that the resulting trust arose out of the fact that plaintiff had contributed his land to be placed in the mortgage, is not sustained by the proof. The difficulty with this contention is that the plaintiff had transferred his land a month before to John M. Ragan. His claim, therefore, that it was his land is without foundation. There are other questions presented in the brief which we do not deem it necessary to consider as the propositions here discussed will, no doubt, be a sufficient guide to the court upon a retrial of the case.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

Solomon v. Solomon.

LECOMPTON D. SOLOMON ET AL., APPELLANTS, v. MARGARET V. SOLOMON, APPELLEE.

FILED OCTOBER 22, 1902. No. 12,060.

Commissioner's opinion. Department No. 1.

1. **Vendor and Purchaser: TRUST, RESULTING: TITLE TAKEN IN NAME OF STRANGER: HUSBAND AND WIFE.** Where one who pays the purchase price of land takes the title thereto in the name of a stranger, the law will by implication raise a resulting trust in favor of him who has paid for the land; but where the one in whose name title is taken stands in the relation of wife to the purchaser, the presumption will be that the conveyance was intended as a gift to the wife.
2. **Appeal and Error: EVIDENCE: SUFFICIENCY.** A finding by the trial court upon a question of fact will not be disturbed upon appeal if supported by sufficient competent evidence.

APPEAL from the district court for Douglas county.
Tried below before DICKINSON, J. *Affirmed.*

Weaver & Giller, for appellants.

Nelson C. Pratt, contra.

KIRKPATRICK, C.

On February 4, 1899, Lecompton D. Solomon and Josephine Points filed in the district court for Douglas county a petition, making Margaret V. Solomon defendant, alleging that they were children of Nathaniel I. D. Solomon, deceased, who had died May 31, 1889, leaving surviving him the plaintiffs, two of the four children by his first wife, and the defendant, his second wife, and her four children, the issue of the second marriage. It was alleged that N. I. D. Solomon for many years had been engaged in the retail glass and crockery business in Omaha, and had accumulated a large amount of property; that he became mentally weak and enfeebled, and was brought to the asylum for the insane at Lincoln for treat-

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ment; and that during his absence on this account the defendant conducted and managed his business on his account and for his benefit, defendant continuing so in charge even after his discharge from the hospital at Lincoln. On February 6, 1882, it is alleged, N. I. D. Solomon purchased the southeast quarter of section 6, township 15, range 13 east of 6th P. M., Douglas county, and paid for it with his own money; but because of his enfeebled mental condition, and fearing the necessity of a return to the asylum at Lincoln, and knowing that in that event the management of the property would again devolve upon the defendant, the title to the land so purchased was taken in the name of the defendant, but that she took it as trustee in fact, recognizing during his lifetime and for several years thereafter that she was holding said property as trustee; that after the purchase of the property N. I. D. Solomon lived with his family thereon, exercising all rights of ownership, and expended a great portion of his means in making many extensive and costly improvements on the land; that it was not until subsequent to the death of N. I. D. Solomon that defendant made any claim that she was the real owner of the property; that the property had been platted, some portions of which had been sold to strangers, other portions had been deeded by defendant to her own children, while still a large portion remained in the name of defendant, who refused to deed any of it to the plaintiffs, the children of N. I. D. Solomon, although entitled to it as much as the children of defendant. It was further alleged in the petition that N. I. D. Solomon was always a kind and affectionate father, never showing a disposition to disinherit any of his children, his intention always being that the children both by his first and second marriage should inherit in equal proportions. The court was asked to adjudge that defendant held in trust a one-eighth interest in the land, consisting of 160 acres, for each of the plaintiffs subject to a dower interest of the defendant. A general demurrer was overruled, and defendant filed an answer, alleging that the property de-

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scribed was purchased by her and paid for with her own money, the consideration being \$4,800, \$1,600 of which was paid upon the delivery of the deed; that a mortgage was given for \$3,200 upon the premises, executed by herself and husband, for the remainder of the purchase price; that this mortgage was later satisfied by giving a mortgage for \$6,000 executed by herself and husband, and that the remainder of the money realized on the last mortgage was used in improvements upon the premises. The property, defendant alleged, was conveyed to her by good and sufficient warranty deed, and that ever since February 6, 1882, she has been the owner and in possession thereof. It was alleged that the tract had been platted, and the streets and alleys dedicated to the city of Omaha. The first and second marriage of N. I. D. Solomon, and the issue thereof, his death, and the disposal by sale of portions of the land to strangers, and that she claimed to own the land, and had never deeded any portions of it to plaintiffs were allegations admitted in the answer. A reply was filed denying new matter in the answer. The trial court found generally for defendant upon the issues joined, and the case is presented to this court upon appeal.

The pleadings show with sufficient fullness the facts relied upon by the several parties to the controversy. It is claimed by appellants that the testimony is sufficient to establish that appellee held the land in controversy in trust for her husband and his heirs. We are unable to accept this view of the evidence. The testimony wholly fails to show that N. I. D. Solomon paid the purchase price for the land. On the other hand, while the testimony tending to show that appellee furnished the purchase price is very meagre, yet it is in our view sufficient to sustain the finding of the trial court. The letter of N. I. D. Solomon, the husband, to his wife, appellee herein, which we find in the record, very strongly supports the theory of appellee that the money necessary to make the first payment on the purchase of the land was furnished by Mrs. Solomon. Not a particle of evidence appears in

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the record tending to establish an express trust, and the only possible theory under which appellants could recover is that if the money for the purchase of the land in question was furnished by the husband, a resulting trust might arise in favor of appellants and the other children of the deceased. The rule is well settled in this state that a resulting trust must be established by evidence full, clear and satisfactory. *Hoehne v. Breitzkreitz*, 5 Neb., 110; *Falsken v. Karkendorf*, 11 Neb., 82; *Klamp v. Klamp*, 51 Neb., 17.

But conceding for the purposes of this discussion that the testimony clearly and satisfactorily established the fact that the purchase price was in fact paid by N. I. D. Solomon, appellants would scarcely be in a better position. This court, in discussing the subject of trusts in *Kobarg v. Greeder*, 51 Neb., 365, said: "Where a person purchases real estate with his own funds and places the title in the name of a stranger, the law presumes that he made such purchase for his own use, and that the stranger holds it in trust for him. But where the purchaser is a married man and the title of the real estate purchased is conveyed to his wife, the presumption is that the purchaser intended the real estate as a gift to his wife." *Creed v. Lancaster Bank*, 1 Ohio St., 1; *Brownell v. Stoddard*, 42 Neb., 177; *Gray v. Gray*, 13 Neb., 453; *Klamp v. Klamp*, *supra*.

It is disclosed by the evidence that the real estate in question is of much greater value now than when the purchase was made, and that N. I. D. Solomon spent a great portion of his means to improve the place. It also appears that the children by his first wife, appellants herein, have received a very small proportion of their father's estate, and there appears to be much equity in their claim that the land in controversy by right belongs to the estate of their father, and was not the separate property of appellee. But under the evidence in the record, and the law as applicable thereto announced in prior decisions of this court, we are unable to afford appellants any relief.

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The judgment of the trial court seems to be right and it is recommended that the same be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

THE CITY OF RED CLOUD, NEBRASKA, APPELLEE, V. THE
FARMERS AND MERCHANTS BANKING COMPANY ET AL,
IMPLEADED WITH JOHN O. YEISER, APPELLANT.

FILED OCTOBER 22, 1902. No. 12,108.

Commissioner's opinion. Department No. 3.

Judgment: EVIDENCE OF EXISTENCE OF: MEMORANDUM. When the existence of a judgment of the district court is a material issue in a case, the existence of such judgment is not established by the memoranda thereof contained in the judgment docket.

APPEAL from the district court for Webster county.
Tried below before ADAMS, J. *Reversed.*

John O. Yeiser, for appellant.

Geo. R. Chaney, contra.

ALBERT, C.

This action was brought by the city of Red Cloud against the Farmers and Merchants Banking Company, William S. Garber, John O. Yeiser, and Ryland Dillard Bedford. The allegations of the petition, on which the case was submitted, so far as are material at present, in effect are as follows: That on the 10th day of January, 1898, the plaintiff recovered a judgment against the banking company for a certain sum, naming it, in the district court of Webster county, which remains wholly unpaid; that on the 7th day of March, 1899, the plaintiff caused an execution to be issued on said judgment, and placed it in the hands of the sheriff of said county, for service, and that said officer thereupon levied the execution on certain real

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estate in said county; that, at the time of the levy, the banking company was the equitable owner of the lot, but the legal title had been vested in a third person in trust for the said banking company; that prior to the levy of the said execution, the trustee conveyed the legal title to the premises to the defendant John O. Yeiser, who at the time of said conveyance, well knew that his grantor held the legal title in trust for the said banking company; that the said Yeiser holds the title to the premises in trust for the banking company, and its creditors, and for no other purpose, but claims to hold both the legal and equitable title to the premises; that by reason of such assertion of ownership, and the fact that the record title stands in the name of the defendant Yeiser, the plaintiff is unable to sell said premises, or procure a purchaser therefor on execution sale; that the sheriff on ascertaining that the legal title to said premises was in the name of the defendant Yeiser, returned said execution wholly unsatisfied for want of property whereon to levy; that the said banking company and the defendant Yeiser, and each of them are wholly insolvent. The prayer for relief is in the usual form.

All of the defendants, except John O. Yeiser, made default. His answer, in effect, consists of a general denial and allegations that he was purchaser in good faith of the premises in question and without any notice whatever that the banking company had any right, title or interest therein. The reply is a general denial. A trial was had to the court, which resulted in a finding and decree for the plaintiff. The defendant Yeiser appeals.

The argument in this case covers a wide field, but narrows down to the single question, whether the competent evidence in the record is sufficient to warrant the finding and decree of the district court. The question of fact, to which counsel have particularly addressed themselves, is the *bona fides* of the conveyance of the premises to the defendant Yeiser, and whether he purchased them without notice that his grantor held the legal title in trust

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for the banking company. On this point the evidence is conflicting and would have warranted, we think, a finding either way. The trial court found for the plaintiff. Under the settled rule of this court, its finding, under such circumstances, will not be disturbed. But there is another matter, put in issue by the pleadings, and that is, whether the plaintiff, prior to the levy of its execution, had obtained a valid judgment against the defendant banking company. That it had obtained such judgment, is one of the material allegations of the petition, and is put in issue by the answer. The only evidence we have been able to find in the record of such judgment is what purports to be a copy of the judgment docket, which reads as follows:

"I, James Burden, clerk of the district court in and for Webster county, Nebraska, do hereby certify that the following is a correct copy of the record of the judgment of the city of Red Cloud against the Farmers and Merchants Banking Company as it appears on page 212 of 'Judgment Docket 4' of the records in my office, to wit:

"'City of Red Cloud, Nebr. Judgment Creditor. Farmers and Merchants Banking Company, defendant debtor. Date of Judgment, January 10, 1898. Amount of Judgment, \$5,349.17. Amount of costs, \$21.35. Execution issued February 4, 1898, Docket "4," page 19. Returned unsatisfied. Execution issued Oct. 11, 1898, Docket "3," page 208, returned unsatisfied. Execution issued March 6, 1899, Docket "4," page 23, returned unsatisfied.' Witness my hand and seal of said court, this 28th day of February, 1901. (Seal.) James Burden, Clerk of the District Court."

It was held in *Burge v. Gandy*, 41 Neb., 151, that such evidence is insufficient to show the existence of a judgment. Applying that rule to the record in this case there is no competent evidence showing the existence of the judgment, which forms the basis of the action. The decree, therefore, can not stand.

It is recommended that the decree of the district court

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be reversed, and the cause remanded for further proceedings according to law.

AMES and DUFFIE, CC., concur.

REVERSED AND REMANDED.

Opinion on rehearing follows.

THE CITY OF RED CLOUD, NEBRASKA, APPELLEE, v. THE
FARMERS AND MERCHANTS BANKING COMPANY ET AL.,
IMPLEADED WITH JOHN O. YEISER, APPELLANT.

FILED APRIL 22, 1903. No. 12,108.

Commissioner's opinion. Department No. 3.

Judgment: EVIDENCE OF EXISTENCE OF: MEMORANDUM. Case re-examined and former opinion adhered to.

REHEARING of case reported *ante*, page 544.

APPEAL from the district court for Webster county.
Tried below before ADAMS, J. *Former judgment of reversal adhered to.*

John O. Yeiser, for appellant.

Geo. R. Chancy, *contra*.

DUFFIE, C.

The former opinion in this case is found *ante*, page 544, 92 N. W. Rep., 160. A careful re-examination of the evidence satisfies us that the case should be remanded to the district court for another trial instead of entering judgment upon the present record. There are numerous disputed questions of fact upon which it is desirable to have the opinion of the trial court. We think it would be exceedingly unfair to the plaintiff in the action to enter final judgment dismissing its bill because of its technical failure to properly show a judgment in its favor against the Farmers and Merchants Banking Company. On the

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rehearing it was insisted by appellee that the offer of the judgment docket showing such a judgment was sufficient proof of its existence, and numerous cases are cited in the brief in support of such contention. None of these cases go to the precise question in point. The judgment docket is a mere abstract, made by the clerk, of the contents of the record of judgments. Such abstract can not be received where the record is at hand and may be used. This precise question was passed on by the supreme court of Iowa in *Baxter v. Pritchard*, 85 N. W. Rep., 633, in which it is said:

"Under Code, section 3784 requiring that all judgments be entered on the record of the court; and section 288, requiring the proceedings of the court to be entered in the record book, and that a judgment docket shall be kept containing an abstract of all judgments, a judgment was not properly proved by producing the judgment docket, but the record book, or a certified copy thereof, should have been produced."

The Iowa statute relating to the records of the district court is substantially the same as our own. But even if such were not the case an abstract which does not purport to set forth the complete contents of a record can not be substituted as evidence of the record itself when the record may be produced.

It is further claimed that the district court will take judicial notice of its own records and that no proof of the judgment was necessary. Whatever may be the rule relating to former orders and proceedings in the case on trial, the general rule is that the court will not take judicial notice of such orders and proceedings in other cases. 17 Am. & Eng. Ency. Law (2d ed.), 926, and cases cited.

We are satisfied that the former opinion was right and that the case should be remanded to the district court for another trial.

ALBERT and AMES, CC., concur.

FORMER OPINION OF REVERSAL ADHERED TO.

Chamberlain Banking House v. Kemper, etc., Dry Goods Co.

CHAMBERLAIN BANKING HOUSE V. KEMPER, HUNDLEY &
MCDONALD DRY GOODS COMPANY.

FILED OCTOBER 22, 1902. No. 12,120.

Commissioner's opinion. Department No. 1.

Corporations: PLEADING CORPORATE CHARACTER: GENERAL DENIAL. A general denial does not put in issue the corporate character of the plaintiff or its capacity to sue.

ERROR from the district court for Johnson county. Tried below before STUBBS, J. *Affirmed.*

M. B. C. True, for plaintiff in error.

Culver & Philip and *Hugh La Master*, *contra.*

DAY, C.

This case is disposed of as to its merits by the decision of *Chamberlain Banking House v. Turner-Frazer Mercantile Company*, 66 Neb., 48.

One additional question is urged that the plaintiff had no legal capacity to sue. There seems to be no merit in this contention as it is alleged in the petition that the plaintiff is a corporation organized under the law of the state of Missouri. The answer is a general denial. This is not sufficient to raise the question of plaintiff's incorporation. *National Life Insurance Co. v. Robinson*, 8 Neb., 452; *Zunkle v. Cunningham*, 10 Neb., 162; *Dietrichs v. Lincoln & N. W. R. Co.*, 13 Neb., 43; *Herron v. Cole Bros.*, 25 Neb., 692. Other cases supporting the proposition are found in Page's Digest, page 526.

We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

Chamberlain Banking House v. Noyes, Norman & Co.

CHAMBERLAIN BANKING HOUSE V. NOYES, NORMAN & COMPANY ET AL.

FILED OCTOBER 22, 1902. No. 12,121.

Commissioner's opinion. Department No. 1.

1. **Partnership: PLEADING: NEBRASKA PARTNERSHIP.** An allegation that a certain firm, named as plaintiff, consists of certain named parties who are pleading, shows an action carried on by the partners, and it is not necessary that it be either alleged or proved that the partnership is a Nebraska one.
2. **Partnership: PLEADING: ACTION IN FIRM NAME: STATUTES.** Allegation that a certain named firm is a partnership organized and doing business in the state of Nebraska is sufficient to authorize the carrying on of the action under the firm name under section 24 of the Code.
3. **Parties: COMPETENCY: PLEADING.** A mere denial that plaintiffs or either of them are competent to sue raises no issue of fact.

ERROR from the district court for Johnson county. Tried below before STUBBS, J. *Affirmed.*

M. B. C. True, for plaintiff in error.

S. P. Davidson, *contra.*

DAY, C.

This case is controlled as to its main issues by the conclusions reached in *Chamberlain Banking House v. Turner-Frazer Mercantile Company*, 66 Neb., 48. In this case, however, there is an additional complaint because of the overruling of a demurrer to the capacity of Noyes, Norman & Co., Henry W. King & Co. and Herman Brothers, each to sue. This is based upon the proposition that each of the first two is alleged to be a copartnership consisting of certain named members and the latter is alleged to be a "partnership organized and doing business in the state of Nebraska."

After the demurrer was overruled, defendants incorporated in their answer the following: "The Chamberlain

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Banking House and Symns Grocery Company * * * deny that Noyes, Norman & Co., Henry W. King & Co. and Herman Brothers are or either of them is competent to sue in the courts of this state."

We do not think that in this form the answer raises any issue nor that there was any error in overruling the special demurrer. It appears clearly in the petition who are the partners in Noyes, Norman & Co. who recovered judgment in that name against Renshaw, and the same is true as to Henry W. King & Co. It appears clearly that Herman Brothers are a Nebraska partnership. The first two firms appearing as individuals and setting out their names had the right to carry on this action as individuals who were copartners, and Herman Brothers as a firm. The answer set out no facts to negative this but only the legal conclusion affirmed and overruled in the demurrer.

It is recommended that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

RICHARD H. JONES ET AL., APPELLEES, V. THE CITY OF
SOUTH OMAHA ET AL., APPELLANTS.

FILED OCTOBER 22, 1902. No. 12,123.

Commissioner's opinion. Department No. 3.

1. **Municipal Corporations: STREETS: PAVING BY PETITION.** The presentation to the city authorities of a petition, signed by the requisite number of owners of property, is essential to confer jurisdiction on such authorities to pave a street, and charge the cost thereof to the abutting property. Following *Henderson v. City of South Omaha*, 60 Neb., 125.
2. **Municipal Corporations: STREETS: CURBING BY PETITION.** The presentation, to the city authorities, of a petition, signed by the requisite number of such owners, is essential to confer jurisdiction on such authorities to order the curbing of a street not ordered to be paved.

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APPEAL from the district court for Douglas county.
Tried below before FAWCETT, J. *Affirmed.*

W. C. Lambert, for appellants.

A. H. Murdock, *contra.*

ALBERT, C.

This action was brought by Richard H. Jones and others against The City of South Omaha and its officers, to restrain the collection of certain special assessments, levied against the property of the plaintiffs in said city, in 1892, for paving and curbing done the preceding year, on the ground that such assessments are illegal and void. The court found for the plaintiffs, and granted the relief prayed. The defendants appeal.

One objection urged against the validity of the assessments is that the paving for which they were levied was not petitioned for, by owners of lots and lands representing a majority of the foot frontage abutting on the street thus improved. That the objection, if sustained, is fatal to the assessments, is no longer an open question in this state. *Henderson v. City of South Omaha*, 60 Neb., 125. This brings us to an examination of the question of whether the requisite number of owners petitioned for the improvement.

Two petitions for the paving, purporting to be signed by owners representing 1,170 feet frontage, were presented to the city council. Another was introduced in evidence, purporting to be signed by owners representing 1,270 feet frontage, which, if considered, would make the aggregate frontage, represented by the petition, 2,440 feet, or a majority of the total frontage affected by the paving, which is 4,110 feet. But we take it for granted that the last named petition was not considered by the trial court, which is presumed to have considered only competent evidence. The record, on the introduction of this petition in evidence, is as follows: "The defendant offers in evidence,

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the instrument marked 'Exhibit 10,' being a petition to pave the district in controversy, and, as the defendant believes, a part of 'Exhibit 2,' offered by plaintiffs." ("Exhibit 2" is one of the other two petitions above mentioned.) "Objected to for the reason that it is incompetent, irrelevant and immaterial, the signatures thereto not being proven; for the further reason that there is no record in the council proceedings of the defendant city, of any such petition ever having been received; that there is no indorsement on the paper showing it to have been filed; and for the further reason that a large number of the signatures thereto designate brick as the material with which they desire this street to be paved." There is no foundation, whatever, laid for the introduction of the paper; it bears no filing mark; there is nothing to show, whether it was signed before or after the city took action, that it was ever before the city council nor that it was ever considered by that body. Most, if not all, the objections urged against its reception were valid, and doubtless would have been sustained had the cause been tried to a jury, and it should not be considered by this court. This, then, would leave but 1,170 feet frontage represented by the petitions or less than a majority. As the law then in force required a majority thereof, it follows that the assessment is invalid. In this view of the case it is not necessary to consider other objections urged against the petitions.

It is not claimed that there was any petition for the curbing. Subdivision 63 of section 68, chapter 15, page 306 of the Laws of 1889, in force at the time, provided, among other things, as follows: "That curbing and guttering shall not be ordered or required to be laid on any street, avenue or alley, not ordered to be paved, except on the petition of a majority of the owners of the property abutting along the line of that portion of the street, avenue or alley to be curbed and guttered." For the reasons heretofore stated there was no valid order for the paving of the street. Its curbing, therefore, could be legally ordered only on a petition signed by the requisite number of own-

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ers, and, as no such petition was presented, the order for curbing and the assessments based thereon are invalid. No laches are shown.

The decree of the district court is right, and we recommend that it be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

Opinion denying rehearing follows.

RICHARD H. JONES ET AL., APPELLEES, v. THE CITY OF
SOUTH OMAHA ET AL., APPELLANTS.

FILED MAY 6, 1903. No. 12,128.

Commissioner's opinion. Department No. 3.

Municipal Corporations: STREETS: PAVING AND CURBING.

REHEARING of case reported *ante*, page 551.

APPEAL from the district court for Douglas county.
Tried below before FAWCETT, J. *Rehearing denied.*

W. O. Lambert, for appellants.

A. H. Murdock, *contra*.

W. F. Button, *amicus curia*.

ALBERT, C.

An opinion was filed in this case last term, and is reported *ante*, page 551, in which the decree of the district court, holding certain special assessments for paving and curbing illegal and void, was affirmed, on the ground that the order for paving was based on an insufficient petition and the order for curbing was made without any petition whatever for such improvement. So far as the curbing assessments are concerned, the ground upon which they were

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held invalid is untenable as the street had been ordered paved within the meaning of subdivision 63, section 68, chapter 15, Laws of 1889, although the order for paving was based on an insufficient petition. *Orr v. City of Omaha*, 2 Neb. [Unof.], 771, 90 N. W. Rep., 301; *City of Omaha v. Gsantner*, 93 N. W. Rep., 407.

But, in this case, both the paving and curbing assessments were assailed on the ground that there had been no valid equalization of such assessments. An examination of the record, discloses that the proceedings for the equalization of the assessments are defective in some of the particulars held vital in the case of *Curtis v. The City of South Omaha*, 93 N. W. Rep., 743, decided at the present term. That being true, both the paving and curbing assessments are invalid, and the rehearing could not result in a different conclusion than that heretofore reached.

It is recommended that the motion for rehearing be denied.

DUFFIE, C., concurs.

REHEARING DENIED.

JOSEPH A. CONNOR V. A. L. ETHERIDGE.

FILED OCTOBER 22, 1902. No. 12,137.

Commissioner's opinion. Department No. 1.

1. Principal and Agent: SETTLEMENT: RECEIPT IN FULL: EFFECT. One who, on a settlement with his principal of transactions by him as agent, writes a receipt in full of all demands and attaches it to a draft for the amount the other party has offered to pay for such a receipt, can not, after taking the money, in the absence of fraud or mistake, renew a claim previously in dispute between the parties.
2. Principal and Agent: SETTLEMENT: RECEIPT IN FULL: MISTAKE. The fact that the party taking the money supposed that certain checks, for whose payment the other party refused to indemnify him unless they were produced, were irrecoverably lost, and also supposed his claim for their payment could not be maintained without them, does not constitute a mistake which permits the disre-

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garding of the settlement and a recovery of the amount of the checks after finding them, no fraud being alleged, and the nature and amount of the claim being well known to both parties.

ERROR from the district court for Douglas county. Tried below before ESTELLE, J. *Reversed.*

W. S. Shoemaker, for plaintiff in error.

John T. Cathers, contra.

HASTINGS, C.

A. L. Etheridge brought this action in justice court of Douglas county against Joseph A. Connor to recover upon two checks for \$71.95 and \$16.60, dated respectively, October 10 and 12, 1894. The checks were drawn by Etheridge in Connor's name in favor of S. W. Siders for corn claimed to have been bought by Etheridge as Connor's agent. The answer of the defendant denied that he signed either of the checks, or that he authorized anyone to sign either of them in his behalf. For a second defense it alleged that on December 31, 1897, the plaintiff and defendant had a settlement of all their differences; that the plaintiff executed and delivered to the defendant a receipt in full of all demands to that date. The reply denied that a settlement had been made of all their differences; denied that the defendant had paid the plaintiff \$170 in full of all demands upon the matters disputed, and alleged that plaintiff executed the receipt in full of all demands by mistake; that the payment was in settlement of another transaction and that the receipt was to cover another transaction than the one sued on. From a judgment against him Etheridge appealed. The district court trial resulted in a verdict in favor of the plaintiff for the amount of the checks and interest upon which judgment was entered. To review this judgment the defendant has brought error to this court.

The testimony shows that during the month of October, 1894, and for sometime prior thereto, the plaintiff had

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been buying grain for the defendant at Greenwood, Nebraska. The defendant kept an account in the bank at Greenwood in his own name, and against this account the plaintiff was authorized to draw checks in payment of grain purchased for the defendant. The checks, which form the basis of this controversy, it is claimed, were drawn in pursuance of this authority. At the time the checks were presented for payment there were not sufficient funds in the bank to meet them and payment thereof was refused, and a few days later the plaintiff claims to have paid the checks out of his private funds and held them as a demand against the defendant. A short time thereafter plaintiff says that he lost the checks, and that they were not found until the early part of 1898. Etheridge continued work for Connor until sometime in the fall of 1897. He says that within about a month after the purchase of this grain from Siders, he presented the claim for repayment on these checks to Connor, who told him "to find the checks." Connor denies this and says he never heard of this matter until sometime in the fall of 1897, about the time that he was closing out the business and trying to effect a settlement with Etheridge. Etheridge says that sometime in the fall of 1897, and not long before the settlement, he brought the matter up and it was talked over and Connor at that time told him that it should have been brought up before. Etheridge also says that at some time, either at the first or subsequent conversations, Connor told him to produce the checks and he would pay them.

There seems to have been considerable difficulty between the parties in the matter of effecting a settlement, Connor having employed a Mr. Clark to present on his behalf some claims. Clark, however, did not succeed in effecting a settlement. The terms of the settlement seem to have been agreed upon between the parties themselves, and finally adjusted by correspondence. Mr. Connor informed Etheridge, when the settlement was under discussion, that he must have a receipt in full; Etheridge at the time had in

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the books this claim for money advanced to Siders for grain upon these checks, and they had just recently been under discussion, but there is nothing to indicate that the checks were mentioned in that immediate connection. Connor seems to have told Etheridge that upon a full settlement and a receipt showing it he would pay \$170; this seems to have been refused by plaintiff at that time. Mr. Etheridge says that he was aware that he had this claim upon the checks, but supposed that they would never be found. A few days later Mr. Etheridge drew up the following receipt:

"GREENWOOD, Dec. 31, 1897.

"Received of Jos. A. Connor, One Hundred and Seventy no-100 Dollars, in full of all demands to date, including 400 bu. shell corn at Ithica.

"\$170.

A. L. ETHERIDGE."

and forwarded it, with a draft, in the following terms:

"\$170.

GREENWOOD, NEB., Dec. 31, 1897.

"Jos. A. Connor pay to the order of First National Bank of Greenwood, One Hundred and Seventy no-100 Dollars in full of all demands to date, including 400 bu. shell corn at Ithica.

"\$170.

A. L. ETHERIDGE."

through his bank to Connor at Omaha, where it was paid. The only mistake of which there is any evidence, is Etheridge's supposition that the checks were lost and his apparent supposition that there could be no recovery without them. The trial court, at defendant Connor's request, gave the following instruction:

"The jury are instructed that the reason assigned by the plaintiff, why he did not bring forward the Siders claim at the time of final settlement, and giving of the receipt in full, that shortly after the alleged loss of the Siders checks, defendant said to plaintiff, when plaintiff found the checks he would settle or pay them or words to that effect, does not constitute a mistake within the meaning of the law by which a receipt in full of all demands to date can be set aside and a recovery had."

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The following instruction was also given:

"You are instructed that a receipt which says on its face that it is in full of all demands up to date, must be taken to be in full of all matters which were claimed, or could have been brought forward at the time it was given, unless it appears by a preponderance of the evidence that some item or matter of claim was omitted by a mistake of the parties, and in this case the burden of proof is on the plaintiff to show by a preponderance of the evidence that the item claimed now to be due, was omitted by mistake of the parties, and if he fails to do so, then you should return a verdict for the defendant."

It would seem that the trial court was correct in both instructions. Number 3 might have gone further. These parties had made a settlement of matter in dispute; the execution of the receipt and the drawing of the draft, and its payment was undoubtedly an accord and satisfaction. *Chicago, R. I. & P. R. Co. v. Buckstaff*, 65 Neb., 334, 91 N. W. Rep., 426. The only mistake in the settlement was that of Mr. Etheridge in supposing that the checks were irrecoverably lost and that their production was necessary to his sustaining a claim for the amount. It has been recently decided, on careful consideration, that where parties settle a dispute upon a legal question, the fact that there was in truth no actual doubt about the law, will not render such settlement nugatory; the fact that the point which was compromised could have been decided but one way under the facts in the case is no ground for repudiating the compromise. *City Electric R. Co. v. Floyd County*, 42 S. E. Rep. [Ga.], 45; *Spriggs v. Bromblett*, 54 Ga., 348; *Morris v. Munroe*, 30 Ga., 630; *Tyson v. Woodruff*, 108 Ga., 368; *Thornton v. Lemon*, 114 Ga., 155; *Honeyman v. Jarvis*, 79 Ill., 318; *Union Bank of Georgetown v. Geary*, 5 Pet. [U. S.], 99; 6 Am. & Eng. Ency. Law [2d ed.], 713, and cases cited, including *Carter White Lead Co. v. Kinlin*, 47 Neb., 409.

As before stated, there is no evidence of any mistake of the parties in this case in making this final settlement

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except Mr. Etheridge's claim that he supposed the checks were irrecoverably lost and that they were necessary to establish his claim. The trial court seems to have thought that this was insufficient, though not quite saying so by its instruction 3, given at defendant's request. If Mr. Etheridge wished to preserve the right of action on these checks, in case they should ever be found, he should have excepted them in this receipt, written out in full in his own handwriting, which he attached to his draft for \$170, which was paid. There is no indication that the dispute over this claim was not *bona fide*. Indeed, according to the plaintiff's testimony, it had been going on for over three years at the time of the final settlement. It is quite true that the plaintiff testifies in several places, that these checks were not included in the settlement, but it is manifest, from his testimony, as well as the defendant's, that the receipt of the money on the \$170 draft was intended to be, and was understood by both parties at the time to be, a final settlement of their mutual claims in the grain business. The specific items that went to make up the \$170 nowhere appear in the record. The general statement that these checks were not included in the settlement, is a mere conclusion. The claim here urged was upon the books, had been recently under discussion by both parties, and its exact amount and nature were well understood. We are compelled to think that the verdict in this case is contrary to the instructions of the court and not supported by the evidence. It is not necessary to discuss the other errors urged by the defendant as it is not likely that they will arise at any further hearing.

It is recommended that the judgment of the trial court be reversed and the case remanded for further proceedings in accordance with law.

DAY and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

Sanford v. Anderson.

WHITFIELD SANFORD, APPELLEE, V. JOHN ANDERSON, AP-
PELLANT, ET AL.

FILED OCTOBER 22, 1902. No. 12,156.

Commissioner's opinion. Department No. 3.

1. **Mortgages: FORECLOSURE: HOMESTEAD: RECEIVER.** A receiver will not under ordinary circumstances be appointed to take possession of mortgaged premises pending an action to foreclose the mortgage when the mortgaged property is the homestead of the mortgagor.
2. **Mortgages: FORECLOSURE: HOMESTEAD: MORTGAGOR'S INTEREST: RECEIVER.** S. foreclosed a mortgage on 160 acres of land occupied by the mortgagor as his homestead. A deficiency existed and S. applied to the court for a receiver pending an appeal to this court taken by the mortgagor from an order confirming the sale. On the hearing it was shown that the value of the whole tract did not exceed \$2,000 above the incumbrance thereon; it was further shown, and the court found, that either of the four forty-acre tracts of which the farm consisted exceeded in value the sum of \$2,000. The court appointed a receiver for all but 45 acres of the tract upon which the orchard, dwelling house and other improvements were located. *Held*, That the mortgagor's interest in the whole tract being less than \$2,000 he was entitled to hold the same as a homestead and that the court erred in appointing a receiver for any part of the tract.

APPEAL from the district court for Saunders county.
Tried below before Good, J. *Reversed*.

B. E. Hendricks, for appellant.

M. B. Reese and *H. A. Reese*, *contra*.

DUFFIE, C.

The appellee foreclosed a mortgage upon the farm of the appellant consisting of 160 acres upon which he resided with his family. The decree recites that the amount due upon the mortgage was \$6,252.30 with ten per cent. interest thereon from January 10, 1898. The land had been sold for taxes prior to the foreclosure proceedings, and the amount due upon this tax lien, which was foreclosed in

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the same action, was \$173.08, together with the sum of \$17.30 as attorney's fee, which was decreed to be a first lien on the premises. After the expiration of the statutory stay requested by the appellant, a sale was had, the sale confirmed by the court, and the defendant took an appeal to this court from the order of confirmation. This order was recently affirmed.

The land sold for \$6,200, leaving a deficiency of \$240, together with accrued interest. In March, 1901, and pending the appeal from the order of confirmation, the plaintiff and appellee applied to the district court for the appointment of a receiver, and upon the hearing the court found that the defendant was entitled to the use of a portion of said land as a homestead and that either of the four forty-acre tracts of which the farm consisted was worth more than \$2,000, and ordered "that the defendant shall within fifteen days from this date file in this court a statement of the selection of said forty acres of land, that the same shall not be included within this order, and that Frank J. Kirchman be and he is hereby appointed receiver of the remaining portion of the farm."

At a later day in the term, upon a showing that the orchard and the dwelling-house and other buildings were situated upon two different forty-acre tracts, the court made the following order: "It is therefore considered, adjudged and decreed by the court that said decree be, and is hereby modified; that the whole of the northeast quarter of the northeast quarter of section 22, and so much of the northwest quarter of the northwest quarter of section 22, all in township 14, range 8, Saunders county, Nebraska, as is actually occupied by the dwelling-house, outhouses, sheds, etc., and the orchards, not exceeding in amount five acres of the last named tract, be and the same are hereby set off and apart by the court, as the homestead of these defendants pending appeal, and the same are hereby exempted from the order of the court made on March 4, 1901, appointing a receiver in said cause. Said decree of March 4 shall in all other respects remain in full force and effect."

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The defendants took an exception to this order, filed a supersedeas bond and brought the case to this court upon appeal.

At the hearing a large amount of testimony was offered as to the value of the premises. This evidence we consider wholly immaterial. The land had been sold to the plaintiff and appellee for the sum of \$6,200. This sale determined the amount to be realized by the plaintiff in his capacity of mortgagee. In case of redemption he could realize no more than this, and this was the amount to be credited upon his decree on final confirmation of the sale, regardless of the real value of the premises. This being so, the defendant was liable to him for the deficiency, and under ordinary circumstances a receiver might probably have been appointed. The premises were, however, the homestead of the defendant, and this court has lately taken strong grounds against putting the homestead of a mortgagor in the hands of a receiver pending proceedings to foreclose the same, holding in effect that the mortgagee must be content with the ordinary relief offered him by the courts and that the extraordinary remedy of appointing a receiver would not be allowed. *Chadron Loan & Building Association v. Smith*, 58 Neb., 469; *Laune v. Hauser*, 58 Neb., 663. In the case first cited it is said:

"In our state the legislature saw fit, and it is a wise and politic provision much to be commended, to exempt from judgment liens and execution or forced sale the homestead, and have made no exceptions from the absolute character of the exemption, save and only as follows: 'The homestead is subject to execution or forced sale in satisfaction of judgments obtained: *First*—On debts secured by mechanics', laborers' or vendors' liens upon the premises. *Second*—On debts secured by mortgages upon the premises, executed and acknowledged by both husband and wife, or an unmarried claimant.' Compiled Statutes, section 3, chapter 36. The legislature is frequently said to be the body or branch of the government nearest the

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people and is sovereign and exclusive in its sphere, that of law-making, and it is not for the courts to infringe upon the domain of the legislative power. The homestead right was made subject to be disturbed only through some voluntary act of the parties who might be entitled to it, and then alone by execution or forced sale. This clearly does not contemplate the deprivation of the enjoyment of the homestead right by or through the appointment of a receiver, and we can not extend what the law-makers have said, and read into the law, the incidental remedies which accompany mortgage liens ordinarily or in general. Any invasion of the homestead right will not be extended beyond the fair, direct import of the enactment by which it may be sought to make it less absolute. It follows that the district court was right and its decree is affirmed."

It is insisted that the district court recognized the homestead rights of the appellant and reserved to him forty-five acres of the land of more than two thousand dollars in value as his homestead. It must be borne in mind that in this state the rural homestead consists of 160 acres of land where the value thereof does not exceed two thousand dollars. The language of the statute is: "A homestead not exceeding in value \$2,000, consisting of the dwelling-house in which the claimant resides, and its appurtenances and the land on which the same is situated, not exceeding 160 acres of land, to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village shall be exempt," etc.

The rights of the claimant under this section have on several occasions been before this court, and it was held, that the extent of the homestead was not to be determined from the fee simple value of the land, but from the homestead claimant's interest therein, exclusive of mortgage and other valid liens existing thereon. *Hoy v. Anderson*, 39 Neb., 386; *Prugh v. Portsmouth Savings Bank*, 48 Neb., 414; *Corey v. Plummer, Perry*

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& Co., 48 Neb., 481; *Mundt v. Hagedorn*, 49 Neb., 409. In the case last cited it is said: "Section 1, chapter 36, Compiled Statutes, exempts to those persons within its provisions a homestead not exceeding \$2,000 in value over and above incumbrances. The exemption in such cases is determined not from the value of the fee simple title but from the value of the claimant's interest in the premises."

As we have seen, the farm of the defendant was incumbered for more than its value if the price for which it sold under the decree is to be taken as fixing its worth. Taking the highest value placed upon it by the witnesses in the proceedings for the appointment of a receiver and it was worth less than \$2,000 over and above the liens established by the foreclosure decree. Suppose, then, that some general creditor of the defendant should attempt to levy his execution on 120 acres of the land, asserting that the remaining forty were worth more than \$2,000, would the court uphold such a proceeding, or would it say that the defendant's interest in the whole tract being less than \$2,000 the whole farm was exempt to him as his homestead?

The question suggests its own answer: clearly there would be nothing on which the general creditor could levy. The defendant's interest in the whole farm being less than \$2,000 the whole tract would be exempt as his homestead and not subject to the execution of the general creditor. The mortgagee, being restricted in the collection of his debt to the ordinary procedure of the courts, has no right to a receiver for property which the general judgment creditors could not reach on execution.

We recommend that the order of the district court appointing a receiver be reversed.

AMES and ALBERT, CC., concur.

ORDER APPOINTING RECEIVER REVERSED.

NOTE.—A rehearing was granted in the above case and June 3, 1903, an opinion on rehearing by HASTINGS, C., was filed in which the above

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Judgment was vacated and the order of the lower court appointing a receiver affirmed. This opinion is reported in — Neb., —, 95 N. W. Rep., 632.—REPORTER.

IRA W. MEFFORD, ADMINISTRATOR OF THE ESTATE OF W. G.
MEFFORD, DECEASED, v. H. OTTO SELL.

FILED OCTOBER 22, 1902. No. 12,162.

Commissioner's opinion. Department No. 2.

1. **Contracts: EVIDENCE: PAROL, TO VARY TERMS.** Where neither fraud nor misrepresentation is practiced in securing a subscription contract, its terms can not be changed or modified by parol evidence.
2. **Contracts: SUBSCRIPTIONS: BINDING EFFECT OF.** Where the power has been delegated to a committee to accept a mill, to which a subscription bonus has been given, and to declare the subscriptions due and payable, in absence of fraud or mistake, the action of the committee will bind the subscribers.
3. **Contracts: SUBSCRIPTIONS: INSTRUCTIONS.** Record examined and held that the court did not err in giving and refusing instructions.

ERROR from the district court for Boone county. Tried below before MUNN, J. *Affirmed.*

H. C. Vail and A. E. Garten, for plaintiff in error.

Reeder & Hobart and McGann & Barkley, contra.

BARNES, C.

This case is before us on a petition in error to the district court for Boone county. It appears from the record that in April, 1899, the citizens of the village of Petersburg, Nebraska, and vicinity, were desirous of having a flouring mill erected in said village, and at a mass meeting held for that purpose, appointed an executive committee to secure the construction and operation of such mill. The committee thereupon circulated a subscription contract in the words and figures following: "We, the undersigned, agree to pay the sum set opposite our name to the executive mill committee, appointed at a meeting

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of the citizens of Petersburg and vicinity, April 17, 1899, for the purpose of procuring and locating a flouring mill of from forty to fifty barrel capacity in Petersburg, Boone county, Nebraska; said amount to be paid when the mill is erected, at the discretion of the above committee." This contract was signed by a number of citizens, each setting opposite his name the amount which he agreed to pay in accordance with its terms. Among said signers was W. G. Mefford, who agreed to pay the sum of \$50. When the committee had secured enough money, by subscription, to carry out the contemplated object it entered into a contract with the defendant, H. Otto Sell, in the words and figures following, to wit: "Petersburg, Nebr., June 30, 1899. I, H. Otto Sell, agree to build and have in active operation a flouring mill of fifty brl. capacity, as soon as practicably to be built, commencing construction on or before July 10, 1899, said mill to consist of first-class machinery. And I further agree to keep said mill in operation for and in consideration of \$1,200 to be paid November 1, 1899, and not less than two acres of ground located east of the railroad right of way north of block three in the original town of Petersburg; said mill building to be thirty by forty not less than thirty-four feet corner posts and well constructed. Said mill to be in active operation by November 1, 1899, no money to be paid until the mill is in active operation. Signed—H. Otto Sell.

"We, the mill committee, agree to fill our part of the above contract. Signed—G. G. Wattles, Nick Henn, F. E. Baxter, Herman Loosbrock, F. H. Arts, Committee."

The mill in question was constructed and put in operation, and "in their discretion was" duly accepted by the committee who, as provided in the contract, declared the subscriptions to be due and payable. Nearly all of these subscriptions were collected by the committee and turned over to the defendant in error. The balance remaining due thereon was duly assigned to the defendant, in writing, by the committee. Mefford having failed and refused to pay his subscription, defendant herein brought suit in

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the district court for Boone county to recover the amount due him on the above contract of subscription. His petition contained the usual averments in such cases, and to this petition Mefford filed his answer, in which he admitted that he signed the subscription list as set forth in the plaintiff's petition, but denied that he was indebted to the plaintiff; alleged the facts hereinbefore set forth, and that said mill was to be furnished with first-class machinery and was to be kept in active operation, and that without such agreement and understanding he would not have signed the subscription list and agreed to pay his subscription of \$50. He further alleged that plaintiff failed and refused to furnish the mill with first-class machinery, but furnished it largely with second-class and second-hand machinery that had been used in other mills, that by reason thereof he was released from any liability upon his subscription list, and prayed judgment for a dismissal of the case and for costs. The reply to this answer was a general denial, and a further allegation that the contract between the plaintiff and the executive committee was entered into long after the execution of the contract set out in plaintiff's petition, and independently of any agreement of the defendant and without the defendant's knowledge. Upon these issues the cause was tried to a jury, a verdict was returned for the plaintiff for the sum of \$50 with interest at seven per cent. from June 5, 1900. The plaintiff thereupon filed a remittitur of the interest; a motion for a new trial was filed and overruled, judgment was entered upon the verdict and to reverse said judgment the case comes to this court. The defendant having died, after the judgment was obtained, one Ira W. Mefford was appointed administrator of the estate of the deceased defendant. He thereupon filed his petition in error and contends:

1. That the court erred in sustaining the objection to interrogatory No. 1, page 21 of the bill of exceptions, and in rejecting the offer of proof made following the said question. The question and offer of proof are as follows:

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"The conversation between me and the defendant was——"
Question by Mr. Garten: "Will you now give that conversation?" (Plaintiff objected for the reason that the question was incompetent, irrelevant and immaterial, and there was an attempt to modify and vary, by oral testimony, the provisions of a written instrument. The court sustained the objection, the defendant excepted, and made the following offer of proof.) By Mr. Vail: "We offer to prove by the witness Mefford, now on the witness stand, that at the time he signed the subscription list sued upon by the plaintiff, he signed it in the presence of the committee the citizens appointed; that at the time the subscription list was read to this witness that he called upon the members of the citizens' committee to explain to him what was meant by the term 'at the discretion of the above committee' occurring in said instrument; that he was told by said committee that the committee was negotiating with H. O. Sell to furnish a bonus to him for the erection of the mill, and that the contract with the said Sell made and entered into by the committee was such that Sell was to erect a flouring mill of from forty to fifty barrels capacity in Petersburg; said mill was to be furnished with first-class new machinery, and was to be in every respect a first-class mill; and that the meaning of the term 'at the discretion of the above committee' interpreted by the committee, and by said Sell, was this, that the committee was not to receive the mill unless said Sell complied with the terms of the contract as above stated in this offer, to wit: To erect a first-class flouring mill, with first-class machinery and to equip the same as a first-class mill. We further offer to prove by this witness that this witness signed Exhibit 'A,' relying upon the interpretation placed upon the contract by the mill committee as above stated in this offer, and would not have signed the same but for the express representation of the committee that that was the true meaning of the words 'at the discretion of the above committee' used in Exhibit 'A.'" This offer was objected to for the reason that it was

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incompetent, irrelevant and immaterial, and tending to alter, vary and change, by oral testimony, the provisions of a written instrument. The objection was sustained by the court, to which ruling the defendant duly excepted.

It is urged that the written contract was ambiguous, and we are cited to several authorities which hold "that the practical construction placed upon an ambiguous contract by the parties will be generally adopted by the court." There is no doubt but that this rule is stated correctly, but we are unable to see any ambiguity in the contract. The power had been delegated the committee to raise the money by subscription and to secure the construction and operation of a flouring mill in the village of Petersburg; the committee was to collect the money and pay it to whomsoever it should enter into a contract with for the purpose of carrying out the object contemplated. No time limit was fixed, but it was understood that the mill should be erected as soon as practicable. The only condition was that it should be a mill of from forty to fifty barrels capacity, and of course it would be inferred that it should be a good and serviceable mill. The only limitation was, that the money should not be paid until the mill was in operation, and "at the discretion of the committee." It is clear that the discretion of the committee related only to the acceptance of the mill as a substantial compliance with the subscription contract and a declaration that the money represented by the several subscriptions should be paid. The contract with Sell, Mefford's Exhibit "One," was not in existence at the time the subscription contract was signed by him. It was a contract or agreement entered into between the committee and Sell after the subscriptions were procured in order that an understanding might be reached, as to the construction of the mill, the kind of mill it was to be, and when completed in order to satisfy the demands of the committee. The whole matter having been entrusted to the committee, including the power to accept the mill and declare payment of the subscriptions due in its discretion, Mefford obtained no

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new rights by the agreement and his subscription contract must be governed by the terms of the instrument itself. In *Gerner v. Church*, 43 Neb., 690, 62 N. W. Rep., 51, we held that "In a suit on a written contract for a subscription payable on certain conditions mentioned in such contract, parol evidence is not admissible, in the absence of fraud, to show that the subscriptions were not to be payable except upon certain other conditions not enumerated in the contract." In that case the defendant offered to testify that at the time of the signing of the contract in suit that Church & Oliver, in whose favor the subscription was made, promised him that the opera house, the object of the subscription, should be constructed of stone in its first story, of pressed brick with cut stone trimmings above the first story, and copper cornices. It was held that the evidence offered did not tend to explain, but to contradict and alter, the agreement between the parties; that it did not tend to show that Gerner was induced by the fraud of Church & Oliver to execute the contract. There is no ambiguity in this contract; there is no claim of fraud in this case, and the court did not err in excluding the evidence offered.

2. It is further contended that the court erred in rejecting the following offer of proof made by Mefford: "We offer to prove by the witness that he is an experienced miller; that he has had ten years' experience in the running of flour mills, and that he is acquainted with the equipments necessary to constitute a first-class mill; that he has inspected the mill in question erected by H. O. Sell, and that the said mill is not a first-class mill in this: that the machinery in said mill is old and second-hand, and that it in no way complies with the terms of his contract with the mill committee in behalf of H. O. Sell for the erection of a first-class flouring mill." It will be observed that the only complaint made by the defendant in this offer is, that the machinery in the mill is old and second-hand; not that the mill is not doing first-class work; not that it lacks in capacity, but the technical ob-

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jection that the machinery in the mill is second-hand. It by no means follows that the mill is not a good, first-class one, for second-hand machinery may do as good work as new, provided its condition and state of repair is all right. Again, the committee to whom was delegated the power and discretion to accept the mill as a substantial compliance with the subscription contract, had accepted it, and in absence of fraud such action concluded the subscribers. This offer of proof states no substantial defense, and the court properly rejected it.

3. It is urged by the plaintiff in error that the court erred in excluding defendant's exhibit "One," and not receiving it in evidence on the trial. Exhibit "One" is the contract made between the executive committee and Mr. Sell, who erected the mill in question. This contract was entered into long after the contract of subscription was made. It was not in existence at the time, and could have been no inducement to Mefford to make his subscription. Mefford's contention was that the mill was to be constructed with new, first-class machinery. In the exhibit offered the word new is not used at all, and the evidence if it had been received would not have supported the allegation of Mefford's answer. We hold that this evidence was properly rejected.

4. Error is assigned on account of the refusal of the court to give instruction No. 1, tendered by the defendant. This instruction sets out the defendant's answer and the contract made between the executive committee and the plaintiff, which had been excluded and was not before the jury, and concludes with the statement that the said contract was binding on the plaintiff; that plaintiff had refused to furnish the mill with first-class machinery; had furnished it with second-hand machinery, and by reason of the failure of the plaintiff to furnish the mill with first-class machinery as provided in the contract, the defendant is released from any liability on the subscription list and the contract set out in the plaintiff's petition, and the defendant is not indebted to the plaintiff in any

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sum whatever. We can not approve of this instruction, the court having excluded the contract set out therein, and the evidence relating thereto offered by the defendant, because it did not establish a defense, which holdings we have approved. It follows that the instruction was properly refused.

5. Error is assigned for the giving of instructions Nos. 1 and 2, given by the court on his own motion. These instructions defined the issues in the case, and concluded with the following: "And it is incumbent upon the plaintiff to establish this allegation by a preponderance of the evidence before he can recover; and if you find that this allegation has been established by a preponderance of evidence then the plaintiff is entitled to recover the amount claimed by him, to wit, the sum of \$50 together with interest thereon from the 5th of June, 1900, at seven per cent. per annum." This instruction was proper and was in no way prejudicial to the interests of the defendant. It must be further observed that the subscription list, introduced in evidence, showed that all of the other persons who signed had paid their subscriptions to the committee, or had settled them with the plaintiff, Sell, either by note or otherwise, except the defendant, Mefford. It was fairly established by the evidence that the mill had been constructed, completed and was in operation, all in substantial compliance with the terms of the subscription contract, and to the satisfaction of the committee, to whose discretion was committed the acceptance and approval of the mill; that Mefford signed the contract of subscription and refused to pay is not questioned.

It appears that the case was fairly tried and the trial resulted in substantial justice between the parties. For these reasons we recommend that the judgment of the district court be affirmed.

POUND and OLDHAM, CO., concur.

AFFIRMED.

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ANNA HALL, APPELLEE, v. R. JEAN MOORE ET AL.,
APPELLANTS.

FILED NOVEMBER 6, 1902. No. 10,453.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error: JURISDICTION: HOW OBTAINED.** In equitable actions this court acquires jurisdiction, on appeal, by the filing of a duly certified transcript within the statutory time; and when duly certified transcripts of the record in two or more cases are included under one cover, and filed in due time, jurisdiction attaches over each case.
2. **Appeal and Error: TIME FOR PERFECTING APPEAL.** The time for perfecting an appeal in such actions begins to run at the date on which the final decree is entered of record.
3. **Estoppel: CONDUCT.** An estoppel by conduct never extends beyond the reasonable inferences to be drawn from such conduct.
4. **Municipal Corporations: SIDEWALKS: TAXATION: LIEN: ESTOPPEL.** A levy of a special assessment for the construction of a sidewalk is necessary to the creation of a lien. And where no levy has in fact been made by the city council, no lien will be created by certifying the expenses of the improvement to the county board and extending it as a tax upon lots adjacent to the improvement. The fact that the owner of the premises in front of which it was laid had knowledge that it was being laid, and made suggestions to the party in charge of the work as to the manner in which it should be done, will not operate as a levy of the tax nor estop the owner from denying the existence of a lien for want of a levy of the tax.
5. **Taxation: SALE: VALIDITY, WHEN PORTION OF TAX INVALID: ASSIGNMENT OF LIEN.** The fact that a portion of the taxes for which lands are sold is illegal does not invalidate the sale where a portion of such taxes is valid, as such sale merely operates as an assignment of the lien for taxes.
6. **Taxation: LIEN: FORECLOSURE: PART OF TAX ILLEGAL: INTEREST: ATTORNEY'S FEES.** In an action for the foreclosure of a tax lien, the court rejected a portion of the taxes as illegal, but allowed the plaintiff interest and attorney's fees therefor. *Held, Error.*

APPEAL from the district court for Buffalo county.
Tried below before SULLIVAN, J. *Reversed with directions.*

R. A. Moore, for appellants.

Frank E. Beeman, contra.

ALBERT, C.

The appellee brought two actions in the district court to foreclose tax liens on real estate in the city of Kearney. The appellants, impleaded with others, were made defendants in each case, but their co-defendants were not the same in both cases. The bill of exceptions contains a stipulation, made in one case, that the evidence taken in it should apply to the other. A decree was entered in each case for the appellee. The appellants brought both cases to this court on appeal, joining the transcripts together under one cover. The appeal as to one of the cases has been dismissed, and, save for a question of practice which we shall notice presently, does not concern us at this time.

The appellee insists that the appeal should be dismissed as to both cases, for the reason that but one transcript has been filed. But the fact that two transcripts are bound together under one cover does not make them one transcript. Whether they should be thus joined is purely a matter of convenience, so long as they are in due form and filed in this court, as in the present instance. We may conceive of cases in which such practice would result in inconvenience to the court, but the court has power to protect itself in such cases when it becomes necessary to do so. It is also urged that but one bill of exceptions was preserved. But it appears to have been allowed in the case in which the appeal is still pending; it is attached to the transcript and duly certified to be the original bill of exceptions in that case. Hence, it is certainly a part of the record in that case; its relation to the case in which the appeal has been dismissed is no longer material.

Another question of practice raised by the appellee is, that the transcript was not filed within six months from the date of the decree. The record shows that while the decree was announced on the 25th day of March, 1898, it was not entered on the records until the 17th day of

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May, thereafter, and less than six months before the transcript was filed in this court. The appellee attempts to distinguish this case from *Bickel v. Dutcher*, 35 Neb., 761, in which it was held that the time in which an appeal may be taken does not begin to run until such decree had been entered of record, so that it is within the power of the appellant to comply with the statute regulating appeals by filing in this court a certified transcript of the proceedings of the district court. The distinction pointed out by the appellee is, that in the case cited it does not appear that the decree was actually rendered before it was entered of record, but rather that the court simply indicated what the decree would be but did not finally pass on the case until the journal entry was prepared and submitted. The distinction, if it be a distinction, does not go to the reason upon which the rule announced in *Bickel v. Dutcher*, *supra*, is based, which is that the appellant is entitled to six months to perfect his appeal, from the date upon which it becomes possible for him to comply with the statute by procuring a transcript of the proceedings. Hence, it would not begin to run until the decree was entered of record. The appeal in this case was perfected in time.

Confining ourselves to the case still pending in this court, the facts are as follows: On the 21st day of November, 1891, a certain lot in the city of Kearney was sold for the taxes for the year 1890, to the plaintiff. From the certificate issued to the plaintiff in pursuance of such sale, it appears that the taxes for which the premises were sold, including interest, penalty and costs at the time of the sale, were \$33.20, which was the amount of plaintiff's bid. On the 1st day of May, 1892, the plaintiff paid the taxes levied on the lot for the year 1891, amounting to \$21.98, and on the first day of May, 1893, paid the taxes levied for the year 1892, amounting to \$37.47. On the 17th day of November, 1894, the premises were again sold for the taxes levied for the year 1893, to one John Brady. The certificate issued to him in pursuance of such sale

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shows that the taxes for which they were sold, including interest, penalty and costs at the time of the sale, amounted to \$28.10, which was the amount of his bid. On the first day of May, 1895, the purchaser last mentioned paid the taxes on the premises for the year 1894, amounting to \$67.50, and on the first day of May, 1896, paid the taxes on the premises for the year 1895, amounting to \$63.10. Afterward, and before the commencement of this action, Brady assigned his lien to the plaintiff. As regards both sales, due notice when the time of redemption would expire was given.

The petition filed in the district court for the foreclosure of the liens was in the usual form. The answer, among other things, charges that a large portion of the tax in question was for a sidewalk in front of the lot taxed; that no petition for such sidewalk had ever been presented to the city council signed by the requisite number of parties therefor, and that no ordinance or resolution of any kind was ever passed by the city council for the construction of such walk. Second, that the county board in making the levy for the years specified, caused a levy to be made for county purposes of more than fifteen mills on the dollar. Third, that the city of Kearney, for the years specified, levied, in addition to other taxes, a hydrant or water tax amounting some years to eight or nine mills on the dollar and that the same were illegal and void. Fourth, that the independent school district of the city of Kearney had only power to levy twenty mills on the dollar for general school purposes; but from 1890 to 1895 said district levied, in addition thereto, some years two mills, some years five mills and some years seven mills, which were included in the general levy and in the amount claimed by the plaintiff. Fifth, that the city council of said city, from 1890 to 1896, in addition to the ten mills authorized by law, levied a tax of one mill each year as a library tax and one-half mill for park and lighting purposes, which items were included in the amount claimed by the plaintiff and were illegal. There is a further charge

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in regard to a four and one-half mills levy, termed a judgment levy, but as we fail to find any evidence in regard thereto in the record it may pass without further notice. The court found as follows:

"Said cause having been duly submitted to the court, upon the pleadings and the evidence, and the court having fully considered the same, the court finds concerning the item charged against the defendant's (R. Jean Moore's) property for library fund, the court concludes that the same is legal and valid.

"That so much of the hydrant or water tax as exceeds five mills is without authority and void.

"That all school tax over and above the amount of twenty mills is without authority and void.

"That upon the issue concerning the sidewalk tax the court finds that said sidewalk was laid by the city of Kearney without any ordinance or resolution of the council directing the same, and without being petitioned by the property holders, but that the same was constructed after notice had been given to the agent of defendant to build the same and that the said city constructed the said sidewalk with knowledge and consent of defendant's agent and remodeled and changed the same after it had been so constructed to suit his requirements. That the amount levied against said lot as sidewalk tax is only the amount which said sidewalk cost the city, and the defendant, because of the acts of her agent in directing the manner in which said sidewalk should be constructed, and with her knowledge and consent, is therefore estopped from denying the validity of the same.

"The court further concludes that any excess above the fifteen mills for county purposes is void but that the insane levy is not a levy for county purposes.

"As a further conclusion the court finds that the sales upon which the certificates in suit were issued were made with jurisdiction and with authority; and that the fact that there was an excess levy under said sale and that part of said tax was for an unauthorized purpose does not

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render the sale void and therefore the plaintiff is entitled to recover attorney's fees and twenty per cent. interest on each of the amounts paid by plaintiff from the dates of payments to the expiration of the time to redeem from said sale.

"The court further finds that the tax certificates and the subsequent taxes paid thereunder as set forth in plaintiff's petition constitute valid tax liens on the following described real estate situate in the county of Buffalo and state of Nebraska, to wit: Lot four (4) Moore and Jones Subdivision, an addition to the city of Kearney and are paramount and superior to any right, title, lien or interest in, to, or against the same of any of the defendants in this action. The court further finds that the time to redeem from said sale for taxes as set forth in plaintiff's petition has now expired and that the plaintiff caused to be served upon all persons entitled to notice the statutory notice to redeem from said sales, and that plaintiff is now entitled to a decree foreclosing said tax liens for the amount due upon the same. That there is due the plaintiff upon the certificates and subsequent taxes set forth in the petition the sum of \$353.70, with interest at ten per cent. from this date, together with a sum equal to ten per cent. of the amount due the plaintiff as attorney's fees."

The appellants insist that the conclusion of the court, to the effect that they are estopped to deny the validity of the sidewalk tax, is erroneous. An estoppel by conduct never extends beyond the reasonable inferences to be drawn from such conduct. In this case, the appellants knew the walk was being laid by the city, and allowed it to be laid without objections; at one time they suggested that it was too level, and acting on this suggestion, the person in charge of the work raised the stringers at one side. The most that can be said of such acts is that they warrant the inference that the appellants were willing that the walk should be laid by the city. Had they sought to enjoin the city from paying the cost of the walk, doubt-

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less their conduct would have operated as an estoppel to deny the authority of the city to have the walk laid. It is not, however, a reasonable inference from such acts that the appellants intended or expected to pay the whole of the expense of such improvement, nor that they intended the same to become a tax lien against the property. Strictly speaking the law does not make the cost of such improvement, or any part thereof, a tax or lien against the premises but merely makes it the basis of a special assessment. Subdivision VII, section 69, article 1, chapter 14, Compiled Statutes. In other words, it is not the cost of the improvement but the amount specially levied in accordance with the provisions of the statute just cited that becomes a lien against the property. The record shows that not a single step was taken in that direction. No attempt to levy the tax was ever made save to certify the cost of the improvement. It is not a question of an invalid levy but of no levy. The appellants can not be estopped to deny the validity of a so-called tax that was never levied.

It is next urged that the conclusion of the court that the plaintiff was entitled to interest and attorney fees on the whole amount paid by her, including the portion of the tax found to be illegal and void, is erroneous. We fully concur in this view. If the plaintiff were not entitled to recover the full amount of the principal sum paid by her, we are unable to understand how she would be entitled to recover interest and attorney's fees on the whole of such sum.

The appellants contend that a part of the taxes for which the sales were made, having been found illegal, the sales for that reason are void. The authorities appear to be to the effect that, in the absence of a curative statute, a sale of land for taxes, a part of which taxes is illegal, is void. *McCann v. Merriam*, 11 Neb., 241; *Correll v. Young*, 11 Neb., 510; *Kimball v. Ballard*, 88 Am. Dec. [Wis.], 705, and cases cited. But all the cases which we have examined, supporting this proposition, are based on

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the theory that a valid tax sale followed by a valid tax deed operates to divest the owner of the title and to vest it in the purchaser at the tax sale. In this state, owing to the omission of the legislature to provide for a seal for the county treasurer, a tax sale only operates as an assignment of the lien of the public to the purchaser at a tax sale. Such sale, therefore, creates no new lien and divests the owner of the property of no title. We think a different rule should apply under such circumstances and that the sale should be held valid to the extent of the legal taxes for which it was sold. The appellants would appear to concede the validity of the sale to the extent that the lien of the public for legal taxes was thereby assigned to the purchaser but insist that such purchaser is not entitled to the increased rate of interest and other items allowable by statute after a valid sale. We do not concur in that view. The public had a valid lien to the extent of the legal taxes. The object of the increased rate of interest, and other items chargeable against the property after a sale, is to induce private persons to invest in such liens, thereby assisting the state in the collection of its revenues. That the public pretends to assign a lien for a greater amount than what is actually due, in itself works no hardship on the owner of the property and we can see no good reason for holding that it should appear to deprive the purchaser of the advantages which the state held out to him as an inducement to the venture. We have not overlooked the case of *Grant v. Bartholomew*, 57 Neb., 673, wherein it was held, that a purchaser claiming under a void sale could not recover the rate of interest that the taxes were drawing at the time he paid them, but in that case the sale was held void on jurisdictional grounds; and for that reason the case, we think, has no application to the one at bar.

The appellants insist that the second sale is void, because the purchaser did not discharge the prior taxes delinquent at the time the sale was made. In support of this contention she cites *Grant v. Bartholomew*, *supra*.

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The distinction between that case and the present is, that in the former there were delinquent taxes against the premises at the time the sale was made, which were not paid by the purchaser. In the present case there were no such taxes because, up to the time of the levy for the taxes for which the second sale was made, the prior taxes had been paid by the purchaser at the first sale. The second purchaser was not required to redeem from the first sale, nor to pay the taxes levied subsequent to such sale which had been paid by the former purchaser.

It is almost, if not wholly, impossible to determine from the record the amount that should be deducted from the amount found due the plaintiff by the district court, in order to conform such amount to this opinion. The tax for sidewalk purposes, with whatever interest and attorney fees were allowed thereon, as well as the interest and attorney fees allowed by the court on such taxes as were found to be illegal, should be deducted.

We therefore recommend that the decree of the district court be reversed, and the cause remanded with directions to ascertain and deduct such amount, and render a decree for the plaintiff accordingly.

AMES and DUFFIE, CC., concur.

The decree of the district court is reversed and the cause remanded with directions to ascertain the amount to be deducted in accordance with the foregoing opinion and to enter a decree accordingly in favor of the plaintiff.

REVERSED WITH DIRECTIONS.

Bowman v. Bellows Falls Savings Institution.

GUSTAVA M. BOWMAN ET AL. V. BELLOWS FALLS SAVINGS
INSTITUTION ET AL.

FILED NOVEMBER 6, 1902. No. 11,087.

Commissioner's opinion. Department No. 2.

1. **Mortgages: FORECLOSURE: CONFIRMATION: OBJECTIONS: AFFIDAVITS: VALUE.** Affidavits filed for the purpose of opposing the confirmation of a judicial sale of real estate, on the ground that the property was appraised too low, should show upon their face that the persons making them were qualified to give competent evidence as to the value of the real estate in question.
2. **Appeal and Error: EVIDENCE, CONFLICTING: VALUE.** The finding of the trial court, upon the question of the value of such real estate based upon conflicting evidence, will not be set aside unless we can say, from an examination of the record, that it is clearly wrong.

ERROR from the district court for Douglas county.
Tried below before FAWCETT, J. *Affirmed.*

A. N. Ferguson, for plaintiffs in error.

Geo. A. Day, *contra.*

BAENES, C.

This case came here on an appeal, but was afterward changed to proceedings in error, from an order of the district court for Douglas county confirming the sale of certain real estate, made by the sheriff of that county, upon a decree of foreclosure. We have examined the record and find that the sale and proceedings were conducted strictly in accordance with the statutory provisions in such cases. The plaintiffs in error objected to the confirmation of the sale on the ground that the appraised value of the property was put at a figure so far below the real value thereof as to amount to constructive fraud. In support of their objection there were eleven affidavits filed, which we find in the record and bill of exceptions. These affidavits were all alike, with the single exception of the value of the real

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estate placed therein. The value as disclosed by these affidavits ranges from \$7,800 to \$8,300. None of the persons who signed these affidavits were engaged in the real estate business and not a single one of them, by his affidavit, qualified himself to testify as to the value of the property in question. Opposed to this evidence the defendants in error filed the affidavits of eight persons, who fixed the value at a figure ranging from \$1,000 to \$5,000. Each of the persons who signed these affidavits testified that he had lived in the city of Omaha for a number of years and had been engaged in the real estate business in said city for many years prior to the signing of his affidavit, and was engaged in said business at that time. Nearly all these persons had made a personal examination of the property and knew the value of it, and one or two of them described the property and the improvements thereon minutely. The trial judge, upon consideration of this evidence, without doubt, concluded that the preponderance of the competent testimony established the fact that the real estate was appraised at its full market value, it having been valued at the sum of \$6,000. It is the settled law of this state that where the findings of the trial court are based upon conflicting evidence this court will not disturb such findings unless they are clearly wrong. This we are unable to say upon a consideration of the record. There is no reason why we should substitute our judgment for the judgment of the district court.

The foregoing being the only ground of objection urged and the only reason assigned why the judgment and order of the district court should be set aside, we recommend that the order confirming the sale of the real estate herein be affirmed.

OLDHAM and POUND, CC., concur.

AFFIRMED.

Powers v. Gage County. Vroom v. Lewis.

LOUIS F. POWERS, APPELLEE, v. THE COUNTY OF GAGE, IN
THE STATE OF NEBRASKA, ET AL., APPELLANTS.

FILED NOVEMBER 6, 1902. No. 11,505.

Commissioner's opinion. Department No. 3.

Taxation: SPECIAL ASSESSMENTS: NOTICE: EQUALIZATION.

APPEAL from the district court for Gage county. Tried
below before LETTON, J. *Affirmed.*

Albertus H. Kidd and L. M. Pemberton, for appellants.

Geo. A. Murphy, William C. Dorsey and Orlando Swain,
contra.

DUFFIE, C.

This is a companion case to *Cook v. Gage County*, 65
Neb., 611, 91 N. W. Rep., 559, and the published notices
of the sitting of the city council as a board of equalization
are of the same general character as those referred to
in that case. Because of the insufficiency of these notices,
the decree of the district court in this case should be
affirmed.

ALBERT and AMES, CC., concur.

AFFIRMED.

M. C. AND E. G. VROOM, APPELLEES, v. WALTER J. LEWIS
ET AL., IMPEADED WITH CHARLES E. MILLER, AP-
PELLANT.

FILED NOVEMBER 6, 1902. No. 11,623.

Commissioner's opinion. Department No. 3.

Appeal and Error: MORTGAGES: CONFIRMATION: RECORD. Record ex-
amined, and held to present no valid objections to an order con-
firming a sale of real estate.

Vroom v. Lewis.

APPEAL from the district court for Douglas county.
Tried below before FAWCETT, J. *Affirmed.*

C. W. De Lamatre, for appellant.

B. F. Thomas, contra.

DUFFIE, C.

This is an appeal from an order confirming a sale of real estate made by the sheriff of Douglas county under a decree of foreclosure. It appears from the record that the property was twice offered for sale, once on the 21st day of November, 1899, and again on January 2, 1900. The sheriff's return, indorsed on the order of sale, recites that when first offered the property was struck off to one F. G. Miller for the sum of one thousand dollars, but that "the amount of said bid not being forthcoming from the said F. G. Miller, or any one for her, I declared no sale and thereupon on the 29th day of November, 1899, I caused a second notice to be published in the *Omaha Weekly Bee* * * * that I would offer said land for sale at the east front door of the court house in the city of Omaha, Douglas county, Nebraska, * * * on the 2d day of January, 1900, at 10 o'clock A. M.," etc.

On December 30, 1899, and while the property was being advertised the second time, F. G. Miller and Charles E. Miller filed a motion asking the court to make an order directing the sheriff to accept the bid of one thousand dollars made at the first sale by F. G. Miller, and to make a return of the sale accordingly, and for such further orders as might be necessary to complete the sale. Whether this motion was ever called to the attention of the court does not appear, but certain it is that the record fails to show that the motion was ever acted upon by the court, and F. G. Miller not being a party to this appeal, we must presume that she has abandoned any claim that she ever asserted under her bid.

February 15, 1900, the defendants filed objections to the

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confirmation of the sale made January 2 of that year, which, with additional objections filed on the 23d of February, were heard and overruled on March 17. The objections urged against the sale present no questions which have not been before this court on numerous occasions and held to be insufficient, with the exception of the fifth, which sets out the bid of F. G. Miller made at the time the property was first offered. As the property brought \$200 more at the second sale than was offered at the first, we discover no reason which the defendants can have for complaining that a second sale was made or that the bid made at the first sale was not accepted.

We recommend the affirmance of the order appealed from.

AMES and ALBERT, CC., concur.

AFFIRMED.

ALONZO HAIGHT V. MARY E. HAYES ET AL.

FILED NOVEMBER 6, 1902. No. 11,632.

Commissioner's opinion. Department No. 1.

1. **Judicial Sale: PROBATE: TIME FOR HEARING APPLICATION TO SELL: JURISDICTION: COLLATERAL ATTACK.** Setting the day of hearing on an administratrix's application for a license to sell real estate at a date four days short of the required six weeks, is an irregularity only and does not prevent jurisdiction attaching to order the sale nor authorize a collateral attack on the sale and proceedings.
2. **Judicial Sale: PROBATE: COLLATERAL ATTACK: FILING CLAIMS.** Jurisdiction having attached, the fact that no claims were ever filed or allowed against the decedent's estate cannot be advanced in a collateral proceeding to show the sale was void.

ERROR from the district court for Platte county. Tried below before HOLLENBECK, J. *Reversed with directions.*

Reeder & Albert, for plaintiff in error.

W. M. Cornelius and *B. P. Duffy*, contra.

DAY, C.

This case comes on error upon the pleadings and findings of fact in the trial court. Two questions at most are presented. First, does the fact that the district court for Platte county, on September 20, 1881, set for hearing on October 29, 1881, four days less than six weeks, the application of an administratrix for an order to sell real estate to pay debts, prevent any jurisdiction attaching? Second, can the fact that no claims were filed or allowed against the decedent owner's estate be availed of in this action to set aside the title of the grantee of the purchaser at the sale ordered at this premature hearing?

This action is a bill *quia timet* brought by plaintiffs below, defendants in error here, to clear up title and recover possession of two eighty-acre tracts of land which were at different times attempted to be sold by plaintiffs' mother as administratrix of their father. As to one of the tracts the trial court found that, six weeks not intervening between the date of the order to show cause and the time set for hearing, the whole proceeding was void for want of jurisdiction and allowed plaintiffs, who had begun their action within five years after reaching their majority, to recover.

The plaintiffs do not seriously contend that the fact that no claims against the father's estate were ever allowed would affect the jurisdiction of the court, and practically the sole question as to a recovery by plaintiffs is whether or not the failure to comply with the statute putting off the hearing until at least six weeks after the application prevented the court's getting jurisdiction. It seems to be conceded that if the court had jurisdiction, the curative statute, section 119, chapter 23, Compiled Statutes, makes the sale good. This defect does not come within any of the five categories of things whose non-observance is fatal, unless it is the first: "That the executor, administrator or guardian was licensed to make the sale by the district court having competent jurisdiction."

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The precise meaning of the phrase, "the district court having competent jurisdiction," seems to be somewhat uncertain. *Hubermann v. Evans*, 46 Neb., at page 793, holds that the almost identical phraseology of section 64 of the same act means simply the proper district court, the one having jurisdiction as to that estate, that is, the one in the county where the letters of administration were granted. On the contrary, in *Wells v. Steckelberg*, 50 Neb., 670, it is held that the proper district court had no jurisdiction to authorize a father who had never been appointed guardian to sell any land. The last decision, however, is entirely in harmony with the holding of this court that the proceeding is one *in rem*. *Hubermann v. Evans*, *supra*; *McClay v. Foxworthy*, 18 Neb., at page 298; *Schroeder v. Wilcox*, 39 Neb., 136. In the last case the jurisdiction to sell, in order to pay debts, four acres of the land involved was challenged on the ground that the notice of the petition to sell was ordered to be made in the *Nebraska Watchman* and the record showed a publication in the *Omaha Republican*. The evidence tended to show, however, a proper publication; but this court says, in the first point of the syllabus, that, on presentation of a petition and the publication of the notice, jurisdiction was acquired which was not subject to collateral attack. In the body of the opinion the proceedings are characterized as *in rem*, and, jurisdiction having vested, no collateral attack on account of mere irregularities in the proceedings leading up to the sale can be tolerated.

In the present case no question is raised as to the petition or as to the sufficient publication of notice, but the jurisdiction is questioned simply because of the time before the hearing being four days short of the required six weeks, and of there being no debts. The latter objection is evidently disposed of by the authority of *Schroeder v. Wilcox*, *supra*. It would seem that the other objection is also.

It is true that the time within which the hearing could lawfully be had is not less than six weeks. It is also true

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that the duty of fixing such time within the statutory limits is committed to the court. Its failure to observe the statutory limits would seem to be an irregularity such as is referred to in section 119, and not a jurisdictional matter. It is hard to see how fixing the right time for hearing is any more a jurisdictional matter in case of an application to sell real estate than in an ordinary action *in personam*, or even so much so. Yet we find in *Ley v. Pilger*, 59 Neb., 561, that an erroneous return day on a summons is "irregular but not void." A county court made a summons, issued nine days before the first Monday of the following month, returnable then, though by statute it should have been a month later. It was held that defendant, not appearing to quash the summons, could not collaterally attack the judgment. If a shortened time before hearing does not prevent jurisdiction *in personam*, notwithstanding the violation of the statute, it would seem clear that it can not do so in a proceeding *in rem* where a proper petition has been filed in the proper court by the right party. Plaintiffs cite cases from New York and California holding that setting the hearing day prematurely avoids all proceedings to sell lands for the payment of debts. Their citations, however, prove too much. The decisions are on the ground that the statute must be strictly followed. Our own statute, as above indicated, expressly provides that irregularities shall not avoid a sale. This statute has been, as we have seen, upheld by this court. If the mere failure by four days to set the hearing far enough in the future is not an irregularity, what would be?

As the main contention of plaintiff in error should be, in our opinion, upheld, it is not necessary to say anything about the quitclaim deed made by the widow. It was made before she was authorized to sell any lands, and conveyed nothing in any event that was the property of plaintiffs.

It is recommended that that portion of the decree in favor of the plaintiffs be reversed, and the cause remanded

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with directions to dismiss plaintiffs' cause of action and to enter a decree in favor of defendant and quieting and confirming his title to the premises as prayed in his cross-petition.

HASTINGS and KIRKPATRICK, CC., concur.

That portion of the decree in favor of the plaintiffs is reversed, and the cause remanded with directions to dismiss plaintiffs' cause of action and to enter a decree in favor of defendant, quieting and confirming his title to the premises as prayed in his cross-petition.

REVERSED WITH DIRECTIONS.

NEBRASKA LOAN & TRUST COMPANY, APPELLEE, v. JACOB WINKLEMAN ET AL., IMPEADED WITH HENRY C MARTZ, APPELLANT.

FILED NOVEMBER 6, 1902. No. 11,648.

Commissioner's opinion. Department No. 3.

Mortgages: FORECLOSURE.

APPEAL from the district court for Sherman county. Tried below before SULLIVAN, J. *Affirmed.*

R. J. Nightingale, for appellant.

H. M. Mathew, contra.

DUFFIE, C.

This is an appeal from an order confirming a sale of real estate made on a decree of foreclosure. The record presents no questions that have not heretofore been passed upon by this court. We therefore recommend the affirmance of the decree.

AMES and ALBERT, CC., concur.

AFFIRMED.

Columbus State Bank v. Carrig.

THE COLUMBUS STATE BANK V. DAVID H. CARRIG.

FILED NOVEMBER 6, 1902. No. 11,677.

Commissioner's opinion. Department No. 3.

1. **Estoppel: WHEN OPERATES.** The silence of one party does not operate as an estoppel in favor of another, unless it appear that such other party has been induced thereby to change his position to his injury.
2. **Payment: QUESTION DOES NOT ARISE.** On the facts stated, *held* that the question of the voluntary payment by one party of the debt of another does not arise.
3. **Trial: DIRECTING VERDICT: INSTRUCTIONS.** When the undisputed facts entitle the successful party to the direction of a verdict, error in the giving or refusing to give certain instructions, is error without prejudice as to the other party.

ERROR from the district court for Platte county. Tried below before GRIMISON, J. *Affirmed.*

Whitmoyer & Gondring, for plaintiff in error.

McAllister & Cornelius, contra.

AMES, C.

This is an action for money had and received, brought by David Carrig against the Columbus State Bank. There was a verdict and judgment for the plaintiff; the defendant brings error.

The following facts are conclusively established by the evidence: The father of the plaintiff was the owner of certain cattle on which he had given a mortgage to secure certain indebtedness which he owed the defendant. It was agreed between the defendant and the mortgagor that the latter might ship the cattle to market and dispose of them; they were to be shipped in the name of the defendant and the proceeds remitted to the bank to apply on the mortgage debt. Without the knowledge of the defendant, the mortgagor and the plaintiff arranged between themselves that five head of cattle, belonging to the latter,

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should be shipped with those of the mortgagor in order to make two car-loads. In pursuance of these two arrangements, the cattle, including those of the plaintiff, were shipped to market and sold about March 17, 1896. They could not be separately consigned, and, with the consent and under the direction of the plaintiff, they were all shipped in the name of the defendant. After they had been sold, and before the proceeds were remitted to the defendant, the plaintiff informed the purchaser that the five head belonged to him and asked that payment therefor be made to him. The purchaser refused, but, at the request of the plaintiff, informed the defendant over the telephone of plaintiff's claim and request. The defendant refused to permit payment to the plaintiff for the five head and directed the purchaser to inform him that if he had any claim to present it to defendant bank; whereupon the purchaser remitted the proceeds of the entire shipment to the defendant. Within two or three days thereafter the mortgagor called on the defendant, had a settlement with it wherein he was credited with the whole of said proceeds and certain evidences of indebtedness surrendered to him. The mortgagor died insolvent about three years after the settlement. The plaintiff made no further claim or demand for the proceeds of the five head of cattle until after the death of the mortgagor. The proceeds of the sale of the five head were \$185.99.

It is strenuously insisted that the plaintiff, by his silence for more than three years, was estopped to claim the proceeds of the five head of cattle. There is an elementary principle of the law of estoppel which is peculiarly applicable to this case; it is thus stated in 1 Herman, Estoppel and Res Judicata, section 7: "Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts, or words, or neglect, his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or abstain from doing something by reason of what he had said or done, or omitted to say or do." In recogni-

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tion of this principle, this court has said: "To create an estoppel *in pais* the party, in whose favor the estoppel operates, must have altered his position in reliance upon the words or conduct of the party estopped." *Lingonner v. Ambler*, 44 Neb., 316. In this case, before the defendant received the money in question it was notified of plaintiff's claim. Within two days from the receipt of such notice it settled with the mortgagor, applied the money on his indebtedness and surrendered to him the said evidences of indebtedness. It can not be claimed that it was induced to make such settlement by any act or omission of the plaintiff. There is nothing in the record to show that the silence of the defendant, from that time on, induced it to change its position in the slightest degree. It is true, it appears that the mortgagor died during such silence and that his estate was insolvent. But for aught that appears in the record, he was insolvent at the time of the settlement. But we do not consider that fact material. The defendant had notice of plaintiff's claim. In its settlement with the mortgagor, within two days from the receipt of such notice, it ignored such claim and took no steps to protect itself. It is in no position now to invoke the harsh rule of estoppel to avoid the result of its own rashness and precipitation.

Error is assigned on certain instructions given by the court, and on the admission of certain evidence; but on the facts conclusively established by competent evidence, it had been proper for the court to direct a verdict for the plaintiff. That being true, such errors, if any there be, are errors without prejudice.

Instructions were tendered by the defendant covering the theory that the plaintiff was in the position of an intermeddler who had voluntarily discharged the debt of another. There is nothing in the record to support such theory. The shipment of the cattle in the name of the defendant was merely a matter of convenience. There was no intention that the proceeds should be applied in the manner they were; they were thus applied over the pro-

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test of the plaintiff. It would be an abuse of language to call such a transaction a voluntary payment. There is nothing in the record from which it can be inferred that by giving the plaintiff the proceeds of his cattle the defendant will be in any worse plight than it would have been had the plaintiff not thus shipped his cattle, nor that it will part with anything that justly belongs to it.

It is next urged that the verdict is excessive. The plaintiff was entitled to a verdict for the amount of the proceeds of the sale, with seven per cent. interest thereon from the receipt thereof by the defendant. The money was received by the defendant not later than March 20, 1896. The verdict was rendered February 28, 1900, and was for \$237.45. A computation will disclose that it is not excessive.

It is recommended that the judgment of the district court be affirmed.

ALBERT, C., concurs.

AFFIRMED.

CHARLES P. KELLOGG & COMPANY V. RYNARD E. W.
SPARGUR.

FILED NOVEMBER 6, 1902. No. 11,720.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: JUDGMENTS: VACATION BY MOTION AND SUIT IN EQUITY: ESTOPPEL.** Where a party institutes a suit in equity to vacate a judgment at law, and from a decree rendered modifying such judgment he prosecutes no appeal, he will be barred from further prosecuting error from an adverse ruling on a motion which he had previously made to vacate the same judgment.
2. **Judgments: VACATION BY PARTNERSHIP: JUDGMENT AGAINST MEMBERS.** Where a judgment at law is made to run against the individuals composing a partnership, a motion by the partnership to vacate such judgment is properly overruled.

ERROR from the district court for Dawes county. Tried below before WESTOVER, J. *Proceeding in error dismissed.*

Kellogg & Co. v. Spargur.

Montgomery & Hall, for plaintiff in error.

Halleck F. Rose and *Allen G. Fisher*, contra.

KIRKPATRICK, C.

This is an error proceeding brought by Charles P. Kellogg & Co. against Rynard E. W. Spargur to reverse a judgment of the district court for Dawes county overruling a motion to vacate and set aside for fraud and irregularity a judgment at law entered against Charles P. Kellogg and others, partners composing the firm of Charles P. Kellogg & Co., plaintiff in error, and in favor of defendant in error in the sum of \$8,735.75. This is the same judgment involved in *Spargur v. Prentiss*, 66 Neb., 222, 92 N. W. Rep., 300, which was submitted with this cause. The matters leading up to the recovery of the judgment at law are stated at some length in the opinion in that case, making a statement thereof herein unnecessary except so far as necessary to an understanding of the question involved.

The record discloses that on the 18th day of September, 1899, Charles P. Kellogg & Co. filed in the district court for Dawes county an amended motion to set aside a judgment at law entered in that court on the 20th day of July, 1898, in favor of the defendant R. E. W. Spargur, and against William H. Kellogg, John H. Prentiss, George Eckart, George Sharp, William D. Mann, William C. Warner, Dwight C. Herrick and James Miller, partners doing business under the firm name and style of Charles P. Kellogg & Co., in the sum of \$8,735.75, because of irregularity in obtaining such judgment in certain particulars which were set out in the motion. On November 9, 1899, the district court for Dawes county overruled this motion, and this action of the trial court is sought to be reversed in this proceeding. It further appears that on the 20th day of September, 1899, the individuals above named, constituting the firm of Charles P. Kellogg & Co., commenced

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a suit in equity in the district court for Dawes county to vacate and set aside the same judgment which was sought to be vacated by the motion above referred to, and upon substantially the same grounds therein set out. On March 1, 1900, a decree was entered in the equity proceeding reducing the judgment which Spargur had obtained from \$8,735.75 to \$1,000. From that decree William H. Kellogg and others failed to prosecute appeal or error proceedings, and it became final as to them. Since the filing of the error proceedings in this cause defendants in error, Rynard E. W. Spargur and others, have filed an answer to the petition in error herein, setting up the decree modifying the judgment at law as a bar to further prosecution of this proceeding.

That this matter can be presented by way of answer to the petition in error has been settled in this court in *Schreck v. Gilbert*, 52 Neb., 813. There it was said: "In a proceeding in error it is proper for the defendant, by way of answer, to set up such facts subsequent to the judgment sought to be reviewed as are claimed to have the effect to waive the error complained of." In answer to the petition in error herein it is alleged that the parties and the issues in the two proceedings are identical, and from an examination of the record we are of opinion that the allegations of the answer are true. This court has had occasion frequently to apply the doctrine of election of remedies. *Wilson v. Roberts*, 38 Neb., 206, was a proceeding in equity for the purpose of stating an account between the parties who had been engaged as partners under a contract with the state to remove the boilers and heating apparatus from the basement of the capitol building and resetting them in a new building to be used as an engine house. On the trial a decree was entered stating an account between the parties, and giving plaintiff a judgment for \$385 and costs. Shortly after the rendition of this judgment in the district court, the defendant filed a motion to modify the judgment, the motion was sustained, and the judgment modified, reducing it from \$385

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to \$362.25. In the meantime the defendant had prosecuted an appeal to this court. In disposing of the appeal, this court said: "By his election to review the decree in the district court the defendant must be held to have waived his right to appeal therefrom. Such is the settled and salutary rule, and one sanctioned by abundant authority." Citing *Indiana Mutual Fire Insurance Co. v. Routledge*, 7 Ind., 25; *Harvey v. Fink*, 111 Ind., 249; *Commonwealth v. Masonic Temple Co.*, 87 Ky., 349; Elliott, Appellate Procedure, section 149.

In this proceeding the individuals composing the firm of Charles P. Kellogg & Co., having elected to institute a proceeding in equity for a vacation of the judgment at law, succeeding in that suit to the extent of a reduction of the judgment to \$1,000; and having taken no appeal or error proceeding therefrom, should, in our opinion, not be permitted further to prosecute this proceeding in error. Van Fleet, Former Adjudication, pp. 88, 89 and 91, 92; Elliott, Appellate Procedure, section 149.

It is contended by plaintiff in error that the suit in equity for the vacation of the judgment at law was brought by the individuals composing the firm of Charles P. Kellogg & Co., and the motion filed in the district court for the vacation of the judgment at law was made in the name of Charles P. Kellogg & Co., and therefore the judgment in the suit in equity is not a bar to this proceeding in error from the ruling on the motion to vacate. It sufficiently appears from the record that the judgment at law rendered in the district court for Dawes county ran in favor of Spargur and against the individual members composing the firm of Charles P. Kellogg & Co. If, as contended by plaintiff in error, the motion to vacate the judgment at law which we are now considering was made by Charles P. Kellogg & Co., at that time a partnership, this of itself was sufficient reason for the district court to overrule the motion and deny plaintiffs in error any relief, and is also sufficient reason why plaintiffs in error can not succeed in this proceeding.

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For the reasons heretofore given, it is recommended that this proceeding in error be dismissed.

HASTINGS and DAY, CC., concur.

PROCEEDING IN ERROR DISMISSED.

HENRY M. KNOLL V. RANSOM C. RANDOLPH.

FILED NOVEMBER 6, 1902. No. 11,996.

Commissioner's opinion. Department No. 3.

Boundaries: SURVEYS: GOVERNMENT CORNERS: EVIDENCE. Government corners fixed by a United States surveyor at the time of the original survey will control the field notes of the survey taken at the time the corner was erected and will control the field notes or courses and distances of any subsequent survey. Such corner, if identified by the proofs, is the best evidence of where the line should be. But in the absence of such corner, or of satisfactory proof of its location, the field notes of the survey will govern and determine the true line, and such field notes and government plats in such case, are *prima facie* evidence of its true location, and the burden is then shifted to the party who wishes to establish the corner at a place different from that called for by the field notes and government plat of the original survey.

ERROR from the district court for Dawson county.
Tried below before SULLIVAN, J. *Affirmed.*

E. A. Cook, for plaintiff in error.

Warrington & Stewart, contra.

DUFFIE, C.

This is an action of ejectment to recover 2.32 acres of land in section 20, township 10, range 24 in Dawson county. The plaintiff in error claims the land as a part of the northeast quarter of said section, and the defendant in error maintains that the land in dispute is a part of the northwest quarter of the section. The determination of the issue depends solely upon the location of the govern-

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ment half-section corner on the north line of said section 20.

The evidence on the part of plaintiff below, and plaintiff in error here, was to the effect that the corner, if ever established by the government surveyors, could not be found, while the defendant's evidence was to the effect that the corner had been found and recognized as early as 1883. In this state of the case the court instructed the jury as follows:

"Instruction No. 4. As a matter of law, where land has been surveyed and corners located by or under the direction of the federal government, all persons are bound to observe such survey and corners where the same can be ascertained, even though mistakes may have been made by the government surveyors in the location of the corners. Where, however, no corners were located by the government surveyors, or where it is impossible to ascertain with any degree of certainty the point where the government surveyor has located the corners, then the county surveyor has a right to locate the corner, and in the case of a quarter corner it would be his duty to fix the corner midway between the known section corners of the section. In this case if, from the evidence, you believe that the quarter corner as fixed by the original survey was at a point near and immediately north of the north end of plaintiff's division fence between the northeast and the northwest quarters of section 20, as contended by the defendant, then it would be your duty to find for defendant. On the other hand, if from the evidence you believe no quarter corner was established on the north line of said section 20 by the government surveyor, or if you believe the government surveyor established a quarter corner on the north line of said section but are unable from the evidence to say with reasonable certainty where the same was located, or if, from the evidence, you believe the alleged corner was located by the government surveyor at the point contended for by the plaintiff, then it would be your duty to find for the plaintiff.

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"Instruction No. 5. Before the plaintiff can recover in the case he must establish by a preponderance of the evidence either that no quarter corner was established by the government surveyor on the north line of said section 20, or that the original location of the same can not be ascertained, or that the point contended for by him is where the alleged quarter corner was originally located."

The evidence is undisputed that at the time and for some period prior to the bringing of the action, there was no physical evidence of the existence of a government corner between the northeast and northwest quarters of said section. In this state of the case, and in the absence of satisfactory oral evidence as to the location of the original corner, the field notes and plat of the original government survey were the best evidence of the point of its location.

In *Woods v. West*, 40 Neb., 307, it was said: "Field notes and plats of the original survey are assumed to be correct until the contrary is shown, and they are competent evidence in ascertaining where monuments are located in case government corners are destroyed or their locations are in dispute; but when it is shown by undisputed evidence that a section corner was located by the government surveyors at a distance different from that given in the field notes, they must give way."

In *Peterson v. Skjelver*, 43 Neb., 663, this court said: "The field notes and plats are competent testimony where the true position of such a corner is not known or is in doubt and is sought to be established, but not controlling or conclusive as to such location; and where original mounds or monuments established by the government survey can be identified or clearly shown they will be accepted in preference to what is stated in the field notes, if at variance therewith."

These cases, and they are in accord with all others to which our attention has been called, clearly announce the rule that where the corner was established and a monument or mound erected by the government survey that is still visible, or its location clearly shown by the proof, such

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corner will be taken as the true corner regardless of what may be shown by the field notes and the plats of the survey. But where the corner is not visible, or where its location is not shown by satisfactory proof, then the field notes and plats of the original survey, being presumably correct, will be accepted as showing its true location and make a *prima facie* case for the party who is compelled to resort to them for proof of his boundary line. The instructions above quoted were faulty, we think, in omitting to state to the jury the evidence that ought to be considered and to govern them in arriving at their verdict in case they were not satisfied from the evidence that the government surveyors had established a quarter corner on the north line of section 20, or in case the location of such corner, if established, was not shown to their satisfaction. The plaintiff in error introduced the field notes of the government survey, and, in the absence of other satisfactory proof of the location of a government corner established by the government surveyors, the field notes and government plats make a *prima facie* case in his favor, and the jury should have been told that in case they were not satisfied from the evidence offered in behalf of the defendant that the government surveyors had established the corner at the point claimed by him, that then their verdict should be controlled by what was disclosed by the field notes of the government survey. This technical error in the instruction could not, however, have worked to the prejudice of the parties, for the reason that an examination shows that the plat and field notes of the government survey locate the quarter corner in dispute at a point midway between the two government section corners.

There being no prejudicial error in the instructions, we recommend the affirmance of the judgment.

AMES and ALBERT, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

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FILED MAY 6, 1903. No. 11,996.

Commissioner's opinion. Department No. 3.

Boundaries: SURVEYS: GOVERNMENT CORNER: EVIDENCE. On rehearing the law of the case as announced in the former opinion is adhered to, but the judgment of the district court is reversed because of a misunderstanding as to the point at which the verdict of the jury fixed the corner in dispute.

REHEARING of case reported *ante*, page 599.

ERROR from the district court for Dawson county. Tried below before SULLIVAN, J. *Judgment below re-affirmed as to law, reversed on question of fact.*

E. A. Cook, for plaintiff in error.

Warrington & Stewart, *contra*.

DUFFIE, C.

The former opinion in this case will be found *ante*, page 599, and in 92 N. W. Rep., 195, where the facts out of which the litigation grew are fully stated. A rehearing was granted on the application of plaintiff in error, not because we were dissatisfied with any of the legal conclusions reached in the former opinion but because we made the mistake of assuming that the jury by its verdict located the quarter corner on the north half of the section midway between the two known section corners. A re-examination conclusively establishes that the jury located the quarter corner sixty links east of a point equi-distant from the two section corners.

In our former opinion we held that the court erred in its fifth instruction to the jury, which was as follows: "Before the plaintiff can recover in the case he must establish by a preponderance of the evidence either that no quarter corner was established by the government sur-

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veyor on the north line of said section 20, or that the original location of the same can not be ascertained, or that the point contended for by him is where the alleged quarter corner was originally located." The rule is that where the government corner can not be located by clear and satisfactory evidence the field notes of the government survey are to be taken as *prima facie* evidence of the location of such corner. The plaintiff made a *prima facie* case in his favor when he showed by the field notes introduced in evidence that the quarter corner in dispute was placed midway between the two section corners. This entitled him to a verdict in the absence of satisfactory proof that the government surveyors had located the quarter corner at a different place than shown by the field notes.

We recommend the reversal of the judgment of the district court and the remanding of the case for another trial.

ALBERT, C., concurs.

JUDGMENT BELOW REVERSED.

JOHN F. ANTHERS, APPELLANT, V. ELIZABETH SCHROEDER
ET AL., APPELLEES.

FILED NOVEMBER 6, 1902. No. 12,170.

Commissioner's opinion. Department No. 2.

1. **Equity: DEBTOR AND CREDITOR: CONVEYANCE BY DEBTOR: OBJECTION BY CREDITOR.** A creditor has no standing in a court of equity to question a conveyance by his debtor which does not impair the security of his debt or hinder or delay him in the collection thereof.
2. **Equity: WHEN MAY NOT BE INVOKED.** Equity will not aid avarice in purloining property.

APPEAL from the district court for Jefferson county.
Tried below before LETTON, J. *Affirmed.*

William M. Clark and E. H. Hinshaw, for appellant.

John C. Hartigan, contra.

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OLDHAM, C.

In the year 1893, John Schroeder, one of the defendants in this cause of action, was the owner of a half section of land in Jefferson county, Nebraska. One quarter section of this land was subject to a mortgage of \$1,600, and was occupied as the homestead of defendant and his family; the other quarter section, which is the land now in dispute, was subject to a mortgage of \$1,400. In this year, defendant John Schroeder, entered into a contract with plaintiff Anthes, for the purchase of 400 acres of land in Clay county, Nebraska, for the sum of \$14,000. Payments were made on this contract from time to time until 1896, when there was a balance still due of about \$2,200. To procure a part of the money used in the making of these payments, defendant Schroeder borrowed \$7,000, and secured the payment thereof by a first mortgage on the 400 acres of land in Clay county, and a second mortgage on the half-section of land before mentioned in Jefferson county. He then gave his note to plaintiff for \$2,200 for the remainder of the purchase price of the Clay county land and secured the payment of the same by a second mortgage on said land. After this \$2,200 note became due, plaintiff brought a suit on the note against the defendant John Schroeder, in the district court for Jefferson county, and, on January 4, 1899, procured a judgment on said note in the sum of about \$3,000. On November 28, 1898, and after the institution of this suit, the half section of the Jefferson county land had been conveyed by warranty deed from defendant Schroeder to his wife, defendant Elizabeth Schroeder. Plaintiff caused an execution to issue on his judgment, which was levied upon this half section of Jefferson county land as the property of John Schroeder. The quarter section in suit was sold at sheriff's sale, on this execution, to plaintiff for \$100, subject to the \$10,000 of mortgages, and the other quarter (which was defendants' homestead) was not sold for want of bidders. This sale was confirmed, deed ordered, and a writ of resti-

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tution issued and plaintiff claims to have been put in possession under this writ.

Plaintiff subsequently instituted the suit at bar in the nature of an action to quiet title to the land in dispute. The petition sets up in detail the proceedings by which plaintiff's deed was procured, and alleges that the conveyance from John to Elizabeth Schroeder was without consideration and made for the express purpose of cheating and defrauding plaintiff and hindering and delaying him in the collection of his judgment, and prays for a decree cancelling the said conveyance and quieting the title of plaintiff to the premises in dispute. Defendants filed separate answers to this suit, each alleging that the conveyance from John to Elizabeth Schroeder was made in good faith and for a valuable consideration, and each denying any intent to hinder or delay plaintiff in the collection of his debt, and alleging that the indebtedness to plaintiff was fully and amply secured by his second mortgage on the lands in Clay county; that there was no equity in the bill, because plaintiff had not exhausted the security held by him before bringing this suit; that this suit is but an effort of plaintiff to procure the lands of defendant Elizabeth Schroeder for a mere nominal and unconscionable consideration; that plaintiff well knew at the time of the sale that the second mortgage indebtedness of \$7,000, which was deducted from the appraised value of these lands, was fully and amply secured by a first mortgage on the Clay county lands, and that the plaintiff is attempting to cheat and defraud defendant Elizabeth Schroeder out of her property and estate under the pretense of obtaining equitable relief.

On the trial of the issues thus joined, the court found that at the time of the conveyance from John to Elizabeth Schroeder, plaintiff's debt was amply secured by a second mortgage on the Clay county lands; that the value of the lands in Clay and Jefferson counties was \$19,000; that after deducting all liens thereon and homestead rights therein there was ample and sufficient security remaining

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to pay plaintiff's debt, and that plaintiff at the time of the transfer could have collected his indebtedness in full by a foreclosure proceeding on his Clay county mortgage. The court further held that plaintiff had been permitted to purchase the land in controversy for an inadequate price by reason of his knowledge that \$7,000 of the indebtedness deducted from the appraised value of said lands was fully secured by a first mortgage in Clay county, and held that there was no equity in the bill and dismissed plaintiff's suit, and plaintiff comes here by appeal.

We have carefully examined the testimony contained in the bill of exceptions and have ascertained from such research that each finding of fact by the court is fully supported by competent testimony, and that in addition to these findings there is evidence in the record tending to show that the transfer from defendant Schroeder to his wife of his equity in the Jefferson county lands was made in consideration of her separate personal property which she joined with him in incumbering for the purpose of securing his indebtedness to his other creditors, and that all his creditors have been protected by sufficient security.

If this case stood alone on the first finding of fact by the trial court, the judgment for defendants would be fully warranted, even though the transfer from Schroeder to his wife had been voluntary and without consideration. A man may make a voluntary conveyance to his wife or his child or to anyone else and such conveyance does not concern his creditors, if he still have property left sufficient to satisfy their just and legal accounts, and if, as found by the court on sufficient evidence, the indebtedness to plaintiff Anthes, was fully secured by a mortgage on the Clay county lands at the time this conveyance was made, he has no standing in a court of equity to question this conveyance, because he has neither been hindered, defrauded or injured by it. *Wagner v. Law*, 3 Wash., 500, 15 L. R. A., 790.

In *Baldwin v. Burt*, 43 Neb., 245, 61 N. W. Rep., 601, this court has announced the rule that "A conveyance or

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mortgage without consideration, and in fraud of the rights of creditors, can not be assailed by one not prejudiced thereby. Such a contract is void as to creditors, but only so far as may be necessary for their protection. It is effective for all other purposes." Of like effect is the holding in *Lewis v. Holdrege*, 56 Neb., 379, 76 N. W. Rep., 890. In addition to this an examination of the record shows an entire lack of anything approximating either conscience or justice in plaintiff's claim, and it is sufficient to say that equity will not aid avarice in purloining property.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur:

AFFIRMED.

CLINTON ORCUTT V. ELIZABETH MCNAIR.

FILED NOVEMBER 6, 1902. No. 12,178.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: NEW TRIAL, MOTION FOR: PLEADING ERROR.** A judgment will not be reversed for errors of law occurring at the trial unless it is alleged in the petition in error that the court erred in overruling the motion for a new trial.
2. **Appeal and Error: NEW TRIAL, MOTION FOR: WAIVING ERROR.** Where this question is raised by counsel the court will adhere to the above rule. Where it is not so raised the court will consider the objection waived, and determine the case upon its merits.

ERROR from the district court for Douglas county.
Tried below before BAXTER, J. *Affirmed.*

Charles W. Haller, for plaintiff in error.

Thomas & Nolan, contra.

BARNES, C.

This suit was brought to recover a balance claimed to be due from the plaintiff herein to the defendant in error,

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Elizabeth McNair, on the purchase price of a lot in the city of South Omaha. Defendant alleged that she sold the lot to the plaintiff at the agreed price of \$900; that only part payment had been made to her, and prayed for a judgment for the balance alleged to be due her therefor. Plaintiff herein, by his answer, first denied that he purchased the lot at the agreed price of \$900; admitted that he traded with defendant for the lot in question, and alleged that he had paid her, by way of cash and other items, the full price of the same. Defendant, by her reply, denied the allegations of the answer. On these issues the cause was tried to a jury, and resulted in a verdict and judgment for defendant in error for the sum of \$135.35. From this judgment plaintiff herein brought the case to this court.

No question is raised as to the pleadings, or the proceedings in the case, and the only errors complained of are those alleged to have occurred upon the trial. It is contended that the verdict is not sustained by the evidence, and that the court erred in giving, and refusing to give, certain instructions to the jury. These are the only questions involved in this controversy. The defendant in error, among other points discussed in her brief, objects to the consideration of any of the plaintiff's assignments, because his petition does not allege that the court erred in overruling his motion for a new trial. We find on examination of the record that the petition lacks that essential averment, and that no leave to amend has been asked for or obtained. This being the condition of the record, errors alleged to have occurred on the trial will not be considered. *James v. Higginbotham*, 60 Neb., 203; *Gandy v. Cummins*, 64 Neb., 312, 89 N. W. Rep., 777; *Gregory v. Leavitt*, 2 Neb. [Unof.], 637, 89 N. W. Rep., 764; *Achenbach v. Pollock*, 64 Neb., 436, 90 N. W. Rep., 304. This rule has become the settled law of this state, and the only exception to it is where the question has not been raised or called to our attention by counsel. We do not think we are called upon to raise the question ourselves and will consider and determine

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such cases upon their merits. Where, however, as in this case, the question is raised by counsel we feel constrained to adhere to our rule, and we therefore recommend that the judgment of the district court be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

LYDIA E. SHUSTER, APPELLANT, v. JAMES E. SHUSTER,
APPELLEE.

FILED NOVEMBER 6, 1902. No. 12,218.

92 NW 203
Commissioner's opinion. Department No. 2.

1. Divorce: CRUELTY: CHARACTER AND SITUATION OF PARTIES. While the habitual use of rough or vile language may amount to cause of divorce, much must depend upon the character of the parties, their situation in life, and the degree of cultivation and refinement they exhibit.
2. Divorce: CRUELTY: CHARACTER AND SITUATION OF THE PARTIES: EVIDENCE. Where the testimony in a suit for divorce tends to show that each party was addicted to the use of profane language about the home and in addressing the other, the court is justified in refusing to grant a divorce to either on that ground.
3. Divorce: CRUELTY: LANGUAGE IMPROPER: PROVOCATION: QUESTION FOR TRIAL COURT. Whether the alleged improper language of the husband was provoked by indiscreet actions of the wife, unless the language used was entirely disproportionate to the occasion, is a question for the trial court.

APPEAL from the district court for Otoe county. Tried below before JESSEN, J. *Affirmed.*

W. F. Moran, for appellant.

D. T. Hayden and *W. W. Wilson*, contra.

POUND, C.

The appellant sued her husband for a divorce, alleging extreme cruelty in that on numerous occasions he had used vile and insulting language toward and about her

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and had made threats of violence. The husband denied each and all of the charges, and filed a cross-petition praying for a divorce by reason of vile and insulting language used toward him, cruel treatment of the child of the marriage, and alleged violent assaults made upon him by the plaintiff. Each party charged the other with repeated false accusations of infidelity. The trial court, after hearing a large amount of evidence, dismissed both petitions. It may be questioned whether the petition states a cause of action within the rule laid down in *Ellison v. Ellison*, 65 Neb., 412, 91 N. W. Rep., 403. Assuming that it does, we think the decree of the district court has ample support in the evidence. While habitual use of rough and vile language may amount to cause of divorce, much must depend upon the character of the parties, their situation in life, and the degree of cultivation and refinement they exhibit. The marriage relation is designed to continue as long as both the parties shall live, and is not to be dissolved for light or trivial causes. *Brotherton v. Brotherton*, 12 Neb., 72; *Dunn v. Dunn*, 26 Neb., 136. Language which would so wound the sensibilities of a woman of cultivation and refinement as to amount to cruelty, might occasion little or no discomfort to one accustomed to rougher surroundings. Where the testimony adduced in a suit for divorce tends to show that each party was addicted to the use of profane language about the home and in addressing the other, the court is certainly justified in refusing to grant a divorce to either on that ground. Mere rudeness of language is not of necessity extreme cruelty. As pointed out in *Ellison v. Ellison*, *supra*, in order to constitute extreme cruelty it must have the effect of so grievously wounding the feelings or destroying the peace of mind of the plaintiff as to impair health or utterly destroy the legitimate ends of matrimony. Where both parties habitually indulge in such language toward each other, they can scarcely claim that their sensibilities have been unduly disturbed. The plaintiff produced several witnesses who testified that defendant had used vile and insulting lan-

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guage to his wife on many occasions in their hearing. She also adduced evidence to show that she had received some bruises on one occasion when a dispute arose. Both plaintiff and her witnesses were very free and explicit in narrating the exact words spoken, and did not appear to be particularly delicate in such matters. The defendant denied all of these charges in detail, and in his turn adduced not a little evidence tending to show that the plaintiff had used rough language habitually about the home and had assaulted him violently more than once; all of which she denied circumstantially when recalled in rebuttal. According to the estimate entertained by the trier of fact as to the credibility of the witnesses, a decree for or against either party would have sufficient support in the evidence.

It is claimed, however, that certain charges of improper conduct and certain testimony given by the defendant on the trial of the cause require a different decree. That portion of the evidence most forcibly urged upon our attention was stricken from the record by the trial court, and is not before us. As to the other matters urged, it may be observed that offering evidence of indiscreet or improper conduct of the wife as an excuse for or explanation of language used toward her and alleged as cause for divorce is not of itself necessarily extreme cruelty. Whether the language used was unjustifiable and cruel must depend not a little upon the circumstances under which it was uttered, and in the nature of things a defendant in such a case must prove on the trial what those circumstances were. This court has held heretofore that the question whether improper language of the husband was provoked by indiscreet actions of the wife, unless the language was entirely disproportionate to the occasion, is one of fact for the trial court. *Walton v. Walton*, 57 Neb., 102. In that case it was said also that rough language so provoked and not disproportionate to the offense is not ground for divorce. The trial court having found against the appellant upon this question, and there being evidence to sup-

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port its finding, it is the duty of this court to affirm the decree. *Segear v. Segear*, 23 Neb., 306; *Nygren v. Nygren*, 42 Neb., 408.

We therefore recommend that the decree of the trial court be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

J. W. DUNAFON ET AL. V. J. M. BARBER.

FILED NOVEMBER 6, 1902. No. 12,223.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error:** EVIDENCE: CONFLICTING. A judgment entered on conflicting evidence will not be disturbed unless clearly wrong.
2. **Witnesses:** IMPEACHMENT: FOUNDATION FOR: DECLARATIONS AGAINST INTEREST BY PARTY: EVIDENCE. Where it is desired to impeach a witness by showing statements made by him contradictory to his evidence given upon the trial, his attention must be called to the particulars of the conversation upon which it is proposed to contradict him, as well also as to the time when, the place where, and the person to whom he is supposed to have made the contradictory statements. The declarations of a party to the action made against his own interest, are always admissible evidence, and may be shown without calling his attention to the time and place of such declarations, or the party to whom they were supposed to be made.

ERROR from the district court for Franklin county.
Tried below before ADAMS, J. *Affirmed.*

J. P. A. Black and A. H. Byrum, for plaintiffs in error.

Geo. W. Prather and E. C. Dailey, contra.

DUFFIE, C.

This action grows out of the following contract entered into between the parties:

"This agreement, made and entered into this 15th day of August, 1900, by and between J. W. Dunafon and J. B.

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McGrew, parties of the first part and J. M. Barber, party of the second part, witnesseth that—

“The parties of the first part have sold to the party of the second part, one hundred fifty (150) head of Panhandle steers, to be selected by party of the second part from a bunch of 200 head of Panhandle steers now owned and kept on 16-1-15, Franklin county, Nebraska, by parties of the first part. Said selection is to take place at any time after date at option of parties of the first part, but it is agreed and understood that immediately after selection by party of the second part the ‘cut out’ shall be either removed from the feed lot or branded. Said steers are to be delivered at option of party of the second part between the first and twentieth days of December, 1900, provided the day set for delivery shall not be the day of a rain or snow storm. Party of the second part agrees to pay for said steers at the rate of 5 cents per pound, to drive them from the feed yard on the above described land at three P. M. of the day of delivery, to take them to the B. & M. station at Bloomington, Nebraska, to weigh them immediately upon arrival at said station, with a two per cent. shrink. Parties of the first part agree to put said cattle upon full feed of soaked corn and alfalfa hay on or before the first day of September, 1900, and to keep such feed continually before them until date of delivery, and to keep them on their natural feed and water on the date of delivery. Party of the second part agrees to pay \$200 upon execution of this contract and \$300 on September 1, 1900, and the balance of purchase price upon delivery of cattle.

“In witness of this agreement the parties thereto have hereunto set their hands, the day and year last above written.

J. W. DUNAFON,

“J. B. MCGREW,

“J. M. BARRER.”

Barber paid \$200 on this contract August 15, 1900, and \$300 September 3, 1900. At the time stipulated in the contract for a delivery of the cattle Barber refused to accept

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the same for the alleged reason that they had not been fed and cared for as required by the contract; and the plaintiffs in error refusing to return him the money paid, he brought this action to recover the same, alleging as a cause for his refusal to accept the cattle that the defendants below had neglected and refused to put the cattle upon full feed of soaked corn and alfalfa until the 15th of September, 1900. Second, that after placing the cattle upon full feed they allowed the hogs to nest in the hay mangers, which caused the steers to refuse to eat the hay, and that they negligently failed to keep sufficient corn in the feed bunks to permit the cattle to get full feed. Third, that in violation of the terms of the contract the defendants quit feeding soaked corn and fed dry corn only from and after November 25th, and that on account of these violations of the contract the cattle were not in suitable condition to ship and put upon the market. The defendants in their answer denied the allegations of the petition relating to the breach of contract, and as a counter-claim they alleged that upon the refusal of Barber to receive the cattle they shipped the same to Kansas City where they were sold in open market and that the price received for the same was something over \$1,000 less than the cattle would have netted them had Barber completed his contract and accepted the cattle. Upon a trial the plaintiff below recovered a verdict for the amount claimed, and, judgment being rendered thereon, the defendants have prosecuted error to this court.

The principal error relied on is that the verdict is not supported by the evidence and that the court erred in not setting the same aside and granting a new trial. The evidence is conflicting. While it is probably true that Barber did not make any objection to the manner in which the cattle were being fed and cared for until about the time fixed for their delivery, still we can not say that there is not sufficient evidence in the record to support the verdict, and such being the case we cannot interfere with the action of the district court in refusing to grant a new

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trial. No other question of importance is presented in the brief of the plaintiffs in error. Exception was taken to the action of the court in overruling the objection made by the defendants below to a question put to D. H. Hollock relating to a conversation between the witness and McGrew, in December, 1900. The question called for a conversation between the parties in September of that year, and it is now said that McGrew, while on the stand, was not interrogated as to any conversation had with the witness in September, and that his attention was not called to the particular conversation indicated by the question. Where it is sought to impeach a witness by showing statements made by him out of court contradictory to his evidence given upon the trial, the rule is imperative that his attention must be called to the particulars of the conversation upon which it is intended to contradict him, as well also as to the time when, the place where, and person to whom he is supposed to have made these contradictory statements. But this rule can not obtain where it is sought to show that a party to the action who becomes a witness on his own behalf has made declarations against his interests, and witnesses may be called to show such declarations without directing his attention to the conversation, or to the time and place, or the person with whom, the conversation is supposed to have been had. *McCoy v. The People*, 71 Ill., 111; *Kennedy v. Wood*, 52 Hun [N. Y.], 46; *Wilson v. Wilson*, 137 Pa. St., 269.

The statements claimed to have been made by McGrew were clearly against his interests, and as such the plaintiff below was entitled to have them go to the jury for what they were worth, although his attention had not been called to the conversation.

We discover no error in the record and recommend the affirmance of the judgment.

AMES and ALBERT, CC., concur.

AFFIRMED.

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ALLEN R. KELLY, APPELLEE, v. FRANK A. BROADWELL ET
AL, APPELLANTS.

FILED NOVEMBER 19, 1902. No. 11,443.

Commissioner's opinion. Department No. 2.

1. **Municipal Corporations: GARBAGE: POWER TO CONTRACT FOR REMOVAL: STATUTES.** Under the statutes in force in the years 1896 and 1897 governing cities of the first class having more than 10,000 and less than 25,000 inhabitants, such cities had the power to contract for the removal of refuse, filth and garbage from private and public premises within their limits and pay a reasonable compensation therefor.
2. **Municipal Corporations: GARBAGE: FUND FOR REMOVAL: ESTIMATES AND APPROPRIATION IN ADVANCE.** Before the city could pay out money for such purpose, or contract to do so, an estimate of the necessary expenses for the current fiscal year must have been made and published, and an appropriation ordinance passed providing a fund therefor.
3. **Municipal Corporations: WARRANTS: ENJOINING PAYMENT: PRESUMPTIONS: BURDEN OF PROOF.** Where one seeks to enjoin the payment of a warrant drawn upon a specific fund, and alleges that no estimate or appropriation was made, or created for its payment, it is incumbent upon him to make competent proof of such facts, and unless he thus overcomes the presumption of official regularity his action must be dismissed.
4. **Municipal Corporations: GARBAGE: REMOVAL OF: EVIDENCE.** Evidence examined and *held*, insufficient to sustain a decree in favor of the plaintiff.

APPEAL from the district court for Douglas county.
Tried below before DICKINSON, J. *Reversed and dismissed.*

James H. Van Dusen, for appellants.

W. C. Lambert and *A. H. Murdock*, *contra*.

BARNES, C.

This suit was commenced in the district court for Douglas county by the appellee, Allen R. Kelly, against Frank A. Broadwell, the treasurer of the city of South Omaha, to restrain him from paying city warrants numbered 3,328, 3,329, 3,330 and 3,331, issued August 10, 1897, to one

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Peter Lenagh, and amounting in all to the sum of \$700. Afterwards the petition was amended, and the city of South Omaha, Peter Lenagh and Coutant & Squires were made parties defendant. It was alleged in the amended petition that on the 9th day of August, 1897, Peter Lenagh, garbage master of the city of South Omaha, filed his claim with the city council for removing garbage previous to that date, and during the preceding fiscal year, from certain premises within the city limits, by which he demanded of the city \$900 as compensation for said services; that on the same day the claim was referred to the finance committee by the city council, and on the following day the committee reported that the sum of \$700 ought to be allowed and paid in full thereof; that the report of the committee was adopted and the claim was allowed at the sum of \$700; that immediately thereafter warrants were drawn on the miscellaneous or general fund for the payment of the sum allowed, which warrants are the ones in question described by the numbers above set forth. It was further alleged that the money to pay the warrants was, or soon would be, in the city treasury; and that unless restrained by the order of the court, the defendant Broadwell, as treasurer of the city, would pay them. It was further alleged that the city had no power to remove the garbage from the premises described in the claim; that no estimate had ever been made on which to base an appropriation ordinance appropriating money for the payment of the warrants; that no appropriation ordinance had ever been passed appropriating money for such payment; that the warrants were illegal and void; that plaintiff was a resident and taxpayer of the city; that the action was brought on behalf of himself and all other taxpayers similarly situated; that he was without any adequate remedy at law, and unless the payment of the warrants was restrained by the order of the court he would suffer great and irreparable injury. The petition concluded with the usual prayer for a temporary and permanent injunction.

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The defendants filed separate answers, which put in issue the allegations of the petition, and some of these answers contained an allegation that at the time the services were rendered for the payment of which the warrants were drawn, and at the time they were issued, there was no valid ordinance in force in the city by which the owners of private property therein could be compelled to remove refuse and garbage from their premises, or under which the cost of removing the same could be collected from the said owners, and that the same could not be made a charge against their property. This allegation was admitted by the reply. Coutant & Squires further alleged in their answer that they purchased the warrants in question from Peter Lenagh, and paid him full value for them, and were the owners and holders thereof at the time of the commencement of the suit.

The cause was tried on these issues. The trial court found generally for the plaintiff, and rendered a decree perpetually enjoining the payment of the warrants at the cost of the defendants. From this decree defendants have appealed to this court, and they will hereafter be called the appellants.

1. The first question presented for our consideration is, had the city of South Omaha the power to remove garbage from public and private grounds within its limits, and pay the cost of such removal under the charter in force at the time when the services were rendered?

It will be observed that it is agreed that at the time there was no valid ordinance in force in the city by means of which owners of private property could be compelled to remove refuse and garbage from their premises, and that the cost of such removal could not be made a charge against their property. It follows that unless the city had power to contract and pay for such removal the refuse, garbage and filth must remain within the city to breed pestilence, disease and death. Such filth would also create a stench and constitute a public nuisance. At the time these matters occurred the city was governed by the provisions of

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article 2, chapter 13a of the Compiled Statutes of 1899, entitled: "Cities of the first class having over 10,000 and less than 25,000 inhabitants." Section 45 of this chapter provides that the city shall have power "To require any and all lots or pieces of ground within the city to be drained or filled, so as to prevent stagnant water or any other nuisance accumulating thereon, and upon the failure of the owners of such lots or pieces of ground to fill or drain the same when so required, the council may cause said lots or pieces of ground to be drained or filled, and the cost and expense thereof shall be levied upon the property so filled or drained, and collected as any other special tax." By section 54, entitled "Health," it is provided that the city shall have the power "To make regulations to secure the general health of the city; to prescribe rules for the prevention, abatement, and removal of nuisances; to make and prescribe regulations for the construction, location, and keeping in order of all slaughter-houses, stock-yards, warehouses, stables, or other places where offensive matter is kept or likely to accumulate within the corporate limits or within five miles thereof." It is further provided in said chapter that the city shall have power "To make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate powers." In section 52 we find the following: The city shall have power "To make regulations to prevent the introduction of contagious, infectious, or malignant diseases into the city, and to create a board of health to make quarantine laws for that purpose and enforce the same within five (5) miles of the city."

It would seem that the provisions quoted are broad enough to give the mayor and city council power to protect the health and welfare of its inhabitants from pestilence and disease by removing or causing to be removed from within the city limits the refuse, filth and garbage collected therein from both private and public premises, to contract with the garbage master to perform the necessary labor to that end, and to pay him a reasonable com-

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pensation therefor. Dillon, in his work on *Municipal Corporations*, Vol. 1, section 144 [4th ed.], says: "The preservation of the public health and safety is often made in express terms a matter of municipal duty, and it is competent for the legislature to delegate to municipalities the power to regulate, restrain, and even suppress, particular kinds of business, if deemed necessary for the public good." In section 369 of said work we find the following: "Our municipal corporations are usually invested with express power to preserve the health and safety of the inhabitants. This is, indeed, one of the chief purposes of local government, and reasonable by-laws in relation thereto have always been sustained in England as within the incidental authority of corporations to ordain." It is further stated that "The courts will not interfere with the legitimate exercise by municipal bodies of their police powers by which the peace, health, comfort and general welfare are secured or promoted." It is further stated that municipal corporations have power to properly control "the time and mode of cleansing such receptacles for refuse matter [sinks, cess-pools, etc.], and removal of their contents," and this "is not only a legitimate subject of municipal concern, but is imperatively demanded by a just regard for the comfort and health of the citizen." In *City of Louisville v. Wible*, 84 Ky., 290, it was held that a contract with the city giving the exclusive right to remove dead animals for five years, was valid. The mayor and council of the city of Baltimore appointed a health officer, prescribing, among his duties and powers, that he should purify and disinfect vessels from the infection of small-pox; and in the case of *Harrison v. Mayor of Baltimore*, 1 Gill [Md.], 264, it was held that such health officer must be paid the reasonable expenses incurred in the discharge of such official duty. We therefore hold that the city had the power, under the statutes in force at the time the acts complained of took place, to contract with the garbage master to remove the refuse, filth and garbage from both public and private premises within the city limits, and pay him a reasonable compensa-

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tion therefor, before attempting to collect the cost thereof from the owners of the property from which such offal was removed.

2.. Appellee further contends that there was no estimate made, no appropriation ordinance passed and no fund provided against which the warrants in question could be lawfully drawn, and for that reason their payment should be enjoined. Sections 60 and 61, article 2, chapter 13a of the statutes in question at that time provided that "The fiscal year of each city shall commence on the second Monday in August. The city shall within the last quarter of each fiscal year pass an ordinance to be termed 'The Annual Appropriation Bill,' and such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporations, not exceeding in the aggregate the amount of tax authorized to be levied during the then ensuing year; and in such ordinance there shall be specified the object and purposes for which such appropriations are made, and the amount or amounts appropriated for each object or purpose." It is further provided that "Before such annual appropriation bill shall be passed, the council shall prepare an estimate of the probable money necessary for all purposes to be raised in said city during the fiscal year for which the appropriation is to be made, including interest and principal due on the bonded debt and sinking fund, itemizing and classifying the different objects and branches of expenditures, as near as may be, with a statement of the entire revenue of the city for the previous fiscal year, and shall enter the same at large upon its minutes and cause the same to be published four weeks in some newspaper published and of general circulation in the city." It must be conceded that if the record shows that these acts, or any of them, were not performed then the warrants are illegal, and are not a lawful charge against the city, and the decree enjoining their payment must be affirmed. We find in the record, however, an appropriation ordinance for the fiscal year

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commencing on the second Monday in August, 1896, and ending August 8, 1897. Said ordinance proceeded by sections to appropriate sums of money for certain specific purposes, including interest on bonded indebtedness, for the payment of judgments against the city, for the expenses of the police department, for the expenses of the fire department, for the expenses of public lights, for salaries of the city officers, for the engineer department, for the improvement of public grounds and parks, and by section eight of said ordinance the following appropriation was made:

"Section VIII. That the sum of \$6,740 is appropriated and set apart to pay the expenses of said city for miscellaneous purposes, and that said fund shall be known as the 'General Fund.'"

Other appropriations were provided for by this ordinance, which was passed July 13, 1896, and published as provided by law. The record shows that the services, for the payment of which the warrants in question were issued, were rendered during the fiscal year covered by this appropriation ordinance, and that the claim was allowed as against the fund for miscellaneous purposes known as the "General Fund," and the warrants were drawn upon that specific fund. It appears, therefore, that an appropriation ordinance was properly passed for the fiscal year during which the services were rendered, for the payment of which the warrants in question were drawn. It was proper for the city to provide a miscellaneous fund, to be called a general fund, for the payment of claims which would arise, and for which it was impossible to estimate the exact amount which would be required. The claim in question was such an one. It thus appears that a fund was provided for the purpose of paying this claim. It is not claimed that this fund was exhausted, and it is now admitted by the petition that there was a sufficient amount of said fund unexpended to pay these warrants. This disposes of the appropriation question.

It is further claimed that no estimate was made by the

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city council upon which to base the appropriation ordinance, and that the ordinance is therefore void. In this case all reasonable presumptions are to be indulged in favor of official regularity. 2 Desty, Taxation, page 615; *Yelverton v. Steele*, 36 Mich., 62.

It may be stated as the rule, that the presumption is that the officers have complied with the law, and their proceedings are valid; but this presumption may be overcome by evidence. It was therefore incumbent upon the appellee to show by some competent evidence that no estimate, such as is provided for in section 62 of the statutes, was ever made and published prior to the passage of the appropriation ordinance. This appellee failed to do. The only evidence offered or contained in the record on this question is as follows: Mr. Lambert, the attorney for the plaintiff, was sworn and gave the following testimony:

Q. Are you familiar with the city records of the city of South Omaha? That is, with the record of council proceedings for the year 1897?

A. I am with some parts of it; yes, sir.

Q. Have you made a search of the records of the city of South Omaha for the purpose of ascertaining whether the records contain an estimate made by the city council of the amount necessary for the general expenses of the city for the year 1897?

A. I did. Yes, sir.

Q. Did you find any record of any estimate being made?

A. No, sir; I did not find such record of an estimate of any kind.

Q. Did you make a search of the records of the city of South Omaha for an estimate of the general expenses, including garbage, for the year 1898?

A. I did.

Q. Did you find any record of any such estimates being made?

A. I did not find a record of any estimate whatever.

The proper objections were made to these questions and answers, which were overruled, and to all of which the

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defendants excepted. On cross-examination the witness testified, when handed a paper, that Mr. Carpenter, the clerk, gave him the paper which was an estimate; that he did not find it in the office of the clerk, that the clerk gave it to him, and told him that he, the clerk, had made it, and that the council had nothing to do with it. It is clear that this evidence fails to establish the fact that no estimate was made and published for the year 1896.

The warrants in question were chargeable against, and payable out of, the miscellaneous fund, or so-called general fund, contained in the appropriation ordinance passed July 13, 1896. This must be the case, for it is settled beyond controversy that each fiscal year must take care of itself. In other words, the expenses incurred during each fiscal year must be paid out of the funds appropriated and collected for that year. This being the case and the appellee having failed to offer any evidence tending to show that no estimate was made and published for that year, he must fail so far as this contention is concerned. It follows that the evidence adduced in the court below was clearly insufficient to sustain the decree. Many questions are contained in the record relating to the admissibility of the evidence, and especially the ordinance offered by appellee. In our view of the case these questions are not material, for the record is such that we are compelled to decide the case on the points discussed herein. For this reason we have treated the case as though all of the evidence offered and contained in the bill of exceptions was properly received.

The appellee having failed to establish such a state of facts as would warrant the court in rendering a decree perpetually enjoining the collection of the warrants in question, we recommend that the decree of the district court be reversed, and the case dismissed at plaintiff's cost.

POUND and OLDHAM, CC., concur.

REVERSED AND DISMISSED.

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY V.
ROBERT MCCARTY ET AL.

FILED NOVEMBER 19, 1902. No. 11,920.

Commissioner's opinion. Department No. 3.

1. Trial: INSTRUCTION, PEREMPTORY: SPECIFIC INQUIRIES: SUFFICIENCY OF EVIDENCE. When a party requests a peremptory instruction in his favor and afterwards requests and obtains the submission of specific inquiries of fact to the jury covering all essential matters in issue and the jury returns a verdict for his adversary, a motion for a new trial on the ground of insufficiency of evidence raises the same questions as that raised by the request and only one of such rulings need be determined in the disposition of the case in this court.
2. Waters and Watercourses: SURFACE WATERS: DAMAGES: EVIDENCE. Objections to the admission of certain evidence examined and held not to be well taken.
3. Waters and Watercourses: SURFACE WATERS: DAMAGES: EVIDENCE. Evidence held to be sufficient to support the verdict of the jury.

ERROR from the district court for Hall county. Tried below before THOMPSON, J. *Affirmed.*

M. A. Reed, M. A. Hartigan and Jas. H. Wooley, for plaintiff in error.

W. A. Prince, contra.

AMES, C.

For a term of about twenty years the defendant company had maintained in its line of road extending across the farm of the plaintiffs a bridge or culvert about twelve feet long and four feet high. There was admittedly a depression of some degree in the plaintiffs' land at this point, and during the time of the maintenance of the bridge, surface water upon the plaintiffs' premises flowed away under it, so that by this means they were sufficiently drained for

agricultural purposes. In June, 1899, the company discontinued the maintenance of the structure and filled the space under it with earth so as to make an embankment. Shortly afterwards a heavy fall of rain occurred, and, the flow of water being obstructed by the embankment, the plaintiffs' lands were flooded, causing injuries to their growing crops, to recover damages for which this action was brought. At the conclusion of the trial the company asked the court for a peremptory instruction in its behalf, which was refused. The case was then submitted to the jury upon the evidence under instructions by the court, and a verdict was returned for the plaintiff, which the defendant seeks to have reversed by this proceeding.

The principal contention of the plaintiff in error is, that there is not sufficient evidence to support the verdict, for the reason that it was not shown that there was a sufficiently well-defined channel or draw at the place in question to require the company to maintain an opening in its embankment for the passage of surface water. The evidence with reference to this question, which was the main battle ground of the trial, is conflicting. At the request of the plaintiff in error, the following among other questions were especially submitted to the jury and answered by them as indicated.

Q. Was there a creek or natural stream running through the opening in the railroad embankment filled up by the defendant?

A. There was a natural course for surface water.

Q. Had the action of the water in passing over the lands rented by plaintiff and in passing up to the place in the embankment filled in by the defendant, cut and worn a well-defined bed or channel in the soil?

A. Yes.

Q. If you answer the last question in the affirmative then state how wide and deep a channel or bed had thus been cut or worn?

A. From six to twenty-four inches deep. No testimony as to width.

Q. Does not the evidence show that there was no water at this place except after severe showers?

A. No.

By requesting the submission of these questions to the jury, we think, the defendant waived the objection that there was no evidence upon the issues sufficient for their consideration, and is bound by the answers given, unless they are wholly without support by the evidence, and thus presented the same question as was presented by the request, and only one of such rulings need be considered in the disposition of the case in this court. We do not think that these especial findings are so entirely destitute of support as would have warranted the court in setting them aside, especially as none of them is complained of in the petition in error. If the situation was such as is described by these findings that fact, taken in connection with the circumstance, which seems to have been practically admitted, or at least undisputed, that the lands had never been flooded during the time of the maintenance of the bridge, leaves no room to doubt the plaintiffs' right of recovery, and renders it unnecessary to consider the instructions of the court bearing upon that question.

Objection is made to some of the evidence admitted as tending to prove the value of a quantity of growing corn destroyed by the waters. We do not feel inclined to go extensively, which we would be obliged to do if we took the matter up at all, into the inquiry whether the methods adopted in this respect were technically correct. The amount of the recovery was so small that if error in this regard was committed it is evident that it could not have seriously, if at all, prejudiced the plaintiff in error. But we will say generally that in our opinion the method adopted, which was to ascertain from the witness, that he had knowledge of the yield of and the value of corn in the neighborhood in the fall following the injury, and of the cost of cultivation to maturity, and then to ask him to state in view of that knowledge what in his opinion was the value of the plant at the time of its destruction, was not erroneous.

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For these reasons it is recommended that the judgment of the district court be affirmed.

ALBERT and DUFFIE, CC., concur.

AFFIRMED.

THE BANK OF CALLAWAY V. JAMES W. HENRY.

FILED NOVEMBER 19, 1902. No. 11,998.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: INSTRUCTION: CHANGING ISSUE.** An instruction which seeks to state the issues and only changes them by adding specific facts, which have been shown in evidence without objection, and does not alter their legal effect, is not ground for reversal.
2. **Appeal and Error: INSTRUCTION: DEFENSES.** An instruction to the jury to find for defendant if they conclude that either of two defenses claimed is true, is not reversible error, though one of the defenses fails to state necessary facts, which, however, are undisputed in the testimony.

ERROR from the district court for Custer county. Tried below before SULLIVAN, J. *Affirmed.*

R. E. Brega, for plaintiff in error.

H. J. Shinn, contra.

HASTINGS, C.

This action is a suit upon a promissory note to which is interposed three defenses: 1. That the plaintiff does not own it. 2. That it has been paid in full; that the maker sold to the payee a pair of horses for \$150 with the agreement that the same should be applied on this note and that the plaintiff had full knowledge of the agreement and authorized the payee to purchase the team and apply its price upon the note. 3. That the defendant made a full and complete settlement with the plaintiff for the amount remaining due on the note after deducting the said sum

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of \$150, and by reason of said settlement, and on consideration of it, the plaintiff agreed to release defendant on the note. Plaintiff replied denying in detail the several allegations of the defendant. From a verdict and judgment for defendant the plaintiff brings error and alleges the court erred in giving instructions numbers 2 and 3; that there were errors of law, duly excepted to, occurring at the trial; that the verdict is contrary to law and not sustained by sufficient evidence, and that there was error in overruling motion for new trial. It will be seen from this that the errors alleged are really the giving of instructions 2 and 3 and that the evidence does not warrant the verdict and judgment.

Instruction number 2 is complained of in oral argument because not accurately setting forth the defenses pleaded. The second and third defenses stated in the answer are set forth at greater length and with the addition of some circumstances taken from the evidence, but they do not seem to vary in substance from the allegations of the pleading, and the various circumstances which are added by the court were all admitted in evidence without objection. The court's interpretation of the answer must be held to be that which the parties themselves made of it at the trial. The complaint of instruction number 3 made orally at the argument, and not in brief, is that it authorizes a verdict for defendant upon either one of the second and third defenses, if found in his favor. It is claimed that the second one does not amount to a defense and that the instruction is consequently erroneous.

The defenses are somewhat inartistically stated in the answer but are in substance as given by the trial court, namely: second, that the maker and payee with full knowledge, consent and authorization of the indorsee had agreed that this team of horses should be taken by the payee and applied upon the note at the agreed price of \$150; third, that after this transaction a settlement was had as to the amount due on the note and in consideration thereof the plaintiff had released the defendant.

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The evidence at the trial showed conclusively that a note had been given to the plaintiff for the balance due on the note sued on, after deducting the \$150, and that this note for the remainder had been paid. We are constrained to think that the district court was right in saying that either of these defenses: that the horses had been originally sold, with plaintiff's knowledge and consent, under an agreement that their price should be applied upon the note, or that a subsequent settlement had been had and their price actually applied and the balance paid and defendant agreed to be released; either of these states of fact, if shown by the evidence, together with the admitted facts of payment of the balance of the note sued, would constitute a defense. It should be added that there was some evidence to knowledge and consent that this team should go towards paying the note, on plaintiff's part before the alleged settlement. We do not find any reversible error in either of these instructions.

So far as the evidence is concerned, the sale of the team by the maker to the payee for a consideration of \$150 to be applied on this note is undenied—indeed, conceded by the plaintiff. The giving to the plaintiff of an order upon the payee for \$150 to be applied to this purpose is also conceded. The taking of a new note from the original maker for the difference between this amount of \$150 and the note sued on, with accrued interest in the sum of \$41, is also admitted. The only question really in dispute is as to whether or not at the giving of this last note there was a settlement and an agreement that in consideration of it and of the order for \$150 the defendant should be released. Defendant expressly swore to such an agreement and that the bank cashier told him the original note would be only held against Holway who had guaranteed it. The plaintiff's cashier swore that the only agreement was that the bank should, if possible, get this money from the original payee, Holway, and if it could be so gotten, it should be applied upon this note. It seems that some two years elapsed after the transaction of the taking of

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the order on Holway for \$150, and the note from the defendant for the balance, before any attempt was made to collect from defendant the \$150. It appears that in the meantime there had been other transactions between the bank and Holway, in which the bank had extended credit to Holway to the amount of several hundred dollars; the jury seem to have believed the defendant's statement rather than the cashier's, and as there is evidence in the record tending to support their conclusion, it can not now be reversed.

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK, C., concurs.

AFFIRMED.

THE PRESIDENT AND DIRECTORS OF THE INSURANCE COMPANY OF NORTH AMERICA, APPELLANT, v. JOHN A. BUCKSTAFF ET AL., APPELLEES.

FILED NOVEMBER 19, 1902. No. 12,052.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error: ISSUE, FACTS NOT IN: EVIDENCE: ESTOPPEL.** Where evidence tending to establish facts not directly put in issue by the pleading, has been admitted without objection, a party can not, on appeal to this court, be heard to complain that such facts were not an issue in the case.
2. **Landlord and Tenant: FIXTURES: EVIDENCE CONFLICTING.** The question of the character of a steam heating plant, whether a permanent fixture or personal property which may be removed by a tenant during his term, is one of mixed law and fact, and the finding of the court upon that question, when based on fairly conflicting evidence, will not be disturbed.

APPEAL from the district court for Lancaster county.
Tried below before HOLMES, J. *Affirmed.*

S. L. Geisthardt, for appellant.

Charles O. Whedon, contra.

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DUFFIE, C.

November 30, 1889, Jane G. Hutchins was the owner of lot 3, block 22, in the city of Lincoln. On said date she made two mortgages thereon to the Clarke-Leonard Investment Company. These mortgages were for \$8,000 each, one covering the north half, the other the south half of said lot. These two mortgages have been foreclosed, a sale of the property had, and appeals are now pending in this court from the order of the district court confirming the sales. Without reciting the various steps leading thereto it will be sufficient to say that The President and Directors of the Insurance Company of North America are now the owners of the liens created by the two mortgages above mentioned and the decrees foreclosing the same, and will, if the order of confirmation is affirmed, be entitled to deeds for the property. Prior to the foreclosure proceedings the Badger Lumber Company became the owner of the north half of the lot by conveyance from Mrs. Hutchins, and has since held title to the property subject to the mortgage thereon, and the Buckstaff Manufacturing Company became the owner of the south half, also subject to the mortgage. There is a three-story brick building on the lot and the petition allèges that there is a steam heating plant therein used for heating the same, and it is charged that John A. Buckstaff, one of the defendants, has dismantled the plant, disconnected the pipes and radiators, removed the boiler from its foundation and removed most of the radiators, steam pipes and steam fittings from the building and stored them elsewhere. An injunction restraining the defendants from removing, destroying or disposing of the property, or from interfering with the plaintiff, or the receiver appointed for the property, from taking possession thereof and replacing the same in the building, is prayed. The answer was a general denial and at the trial a decree was entered dismissing the plaintiff's petition.

The appellant, in its brief, insists that the decree appealed from is erroneous for the following reasons:

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"1. All the material allegations of the petition were established by uncontradicted evidence.

"2. The finding of the district court, that the defendant Buckstaff was entitled to remove the steam heating plant, because he had placed the same upon the property temporarily as lessee, is not responsive to any issues in the case and wholly extra-judicial.

"3. The boiler and steam heating plant were fixtures, and had become a part of the realty under any aspect of this case.

"4. The plaintiff, on the showing made in support of the petition, is entitled to a perpetual injunction restraining the removal of the heating plant, and further restraining the defendants from interfering with the plaintiff or receiver in retaking and replacing the property removed, so far as the same can be identified and traced."

It is urged that as there was no defense asserted against the plaintiff's claim except a general denial that there were two questions only which the court could consider: 1st. Did the evidence establish the allegations of the petition? 2d. Did the petition state a cause of action?

As a general rule the proposition contended for by the appellant is true, but, like all general rules, it has its exceptions, and one exception, apparently well established, is that where evidence is taken without objection on a question germane to the case on trial but not put in issue by the pleadings, the admission of the evidence makes it an issue which the court should submit by a proper instruction to the jury, if the case is so tried, and a party on appeal can not urge that it was not an issue in the case. *Collins v. Collins*, 46 Ia., 60; *Gaston v. Austin*, 52 Ia., 35; *Wilson Sewing Machine Co. v. Bull*, 52 Ia., 554. In this case the defendants introduced evidence without any objection being made that it was not an issue in the case, tending to show that John A. Buckstaff was in possession of the mortgaged premises as tenant and that while so in possession he put in the heating plant for a temporary purpose and in a temporary manner, intending to remove the

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same at the termination of his tenancy. Not only was this evidence of the defendant given without objection from the plaintiff, but the witnesses were cross-examined at length upon the question of the temporary character of the plant, and a witness was called in rebuttal by whom it was sought to show that the heating plant was put in in the usual manner and as a permanent fixture.

The whole record makes it apparent that the case was tried and submitted to the court upon the theory advanced by the plaintiff that the plant was a part of the realty, and upon the part of the defendants that it was personal property which could be removed by the tenant previous to the expiration of his term. The plaintiff's petition alleged that it had a lien on the property by virtue of its mortgages and decrees of foreclosure; that the defendant Buckstaff, with intent to cheat and defraud the plaintiff, and for the purpose of depriving plaintiff of its lien upon said steam heating plant and fixtures, and with intent to despoil said property and to make it of as little value as possible to the plaintiff, had proceeded to dismantle said steam heating plant, etc. It is evident from the record before us that at the trial the attorneys and court proceeded upon the theory that by their general denial the defendants put in issue the character of the property, whether real or personal, and that this was the real issue in the case. At any rate that issue was tried, and the court in its decree found that "at the time of the making of the plaintiff's mortgage the steam heating plant described in plaintiff's petition herein, was not a part of the real estate in said mortgage described; that the defendant John A. Buckstaff, as lessee of said property, placed said steam plant in said property temporarily and that the same can be removed without detriment to said property."

We think it too late at this stage of the case to say that the only matter presented to the court was the sufficiency of the petition and of the evidence to support it, and to ask us to disregard all evidence offered by both parties

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upon the question of whether the plant was a removable trade fixture. Upon the question whether the plant was put in for a temporary purpose and in a temporary manner, the evidence is extremely conflicting, and as the question of the character of the fixture is one of mixed law and fact to be passed upon by the jury, under proper instructions, or the trial court, where the trial is to the court, we can not interfere with the finding made. John A. Buckstaff himself testifies that after becoming lessee of the premises he put in the plant for the purpose of heating the living rooms in the second and third stories; that he had a boiler which was large enough to run machinery and heat the building, and that he put it in with a view of running in connection with the building a laundry; that the pipes were put in and connections made for the purpose of attaching laundry machinery, laundry steamers and things like that; that no floor or ceiling plates were used; that he informed the contractors who put in the plant that he did not want the plant put in permanently as he might want to take it out, and it was not necessary to fasten anything down to the building.

M. F. O'Connor testified that he put in the plant and did all the work except connecting the boiler with some of the large pipes; that the plant was put in so that it could be taken out; that the boiler was an eighty horse-power, whereas one of twenty-five or thirty horse-power would be sufficient for heating purposes alone; and on being asked how it was put in with a view to being used for any other than heating purposes, replied that openings were left for pipes to be connected at any time.

Alfred J. Wyant, a witness for plaintiff, squarely contradicts this witness and says the plant was put in in the usual and ordinary way of fitting such plants.

Under the circumstances and because of the great conflict in the evidence, we can not say that the finding of the district court was not supported by the evidence, and we recommend that the decree appealed from be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

Hicks v. City of Omaha.

GEORGE N. HICKS ET AL., APPELLEES, v. THE CITY OF OMAHA
ET AL., APPELLANTS.

FILED NOVEMBER 19, 1902. No. 12,145.

Commissioner's opinion. Department No. 1.

Municipal Corporations: STREETS: PAVING AND CURBING. The question in this case having been adjudicated in *Orr v. City of Omaha*, 2 Neb. (Unof.), 771, 90 N. W. Rep., 301, the decree below is modified so as to conform to the rule there announced.

APPEAL from the district court for Douglas county.
Tried below before FAWCETT, J. *Modified and affirmed.*

James H. Adams and Charles E. Morgan, for appellants.

H. W. Pennock, contra.

LOBINGIER, C.

In the court below appellees prayed for a decree enjoining appellants from enforcing certain assessments for paving and curbing. After setting forth certain alleged defects in the petition requesting said paving, they further averred that "no petition of property owners along said street was ever secured, filed or acted upon by said city council requesting the curbing of said street and the said city council acted without authority or jurisdiction in ordering said street curbed." Upon a hearing on the merits, a decree was rendered in accordance with this prayer, finding "that all of the allegations of the petition are true," and perpetually enjoining appellants from enforcing said assessments either for paving or curbing. Appellant does not here seek a reversal of this decree but merely a modification thereof as to the assessments for curbing, and relies on *Orr v. City of Omaha*, 2 Neb. [Unof.], 771, 90 N. W. Rep., 301, in support of its contention. This modification is not resisted by appellees and it is practically conceded that the case cited is decisive of this. Indeed there would seem, if anything, to be more

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reason for the application of the doctrine of that case to the one at bar, since here the paving and the curbing were ordered by separate ordinances and the ordinance for the curbing was not passed for some three weeks after that which ordered the paving.

It is therefore recommended that the decree be so modified that appellants, the city of Omaha, its treasurer and his successors in office, be perpetually enjoined from enforcing so much of said assessments as relate to said paving; and that as to the curbing assessments, if there be any such, distinct and separate from the said paving assessments, the injunction herein be dissolved and said appellants be permitted to enforce the same; and that the decree of the district court, as thus modified, be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

SO MODIFIED AND AFFIRMED.

ALFRED M. CRAIG ET AL., ADMINISTRATORS OF THE ESTATE
OF OLOF HAWKINSON, DECEASED, v. LEWIS ANDERSON.

FILED NOVEMBER 19, 1902. No. 12,171.

Commissioner's opinion. Department No. 3.

1. **Executors and Administrators: CONTRACTS: BINDING EFFECT.**
The administrator of an estate cannot make contracts in his representative capacity which will bind the estate.
2. **Estates: DECEDENTS: CLAIMS: COURTS, DISTRICT: JURISDICTION.** The district courts of this state have no original jurisdiction to allow claims against the estate of a decedent or to order the payment of such claims out of funds in the hands of the administrator.

ERROR from the district court for Phelps county. Tried below before ADAMS, J. *Reversed.*

James I. Rhea, for plaintiffs in error.

Clency St. Clair and *Charles C. St Clair* contra.

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DUFFIE, C.

The plaintiffs in error are the administrators of the estate of Olof Hawkinson, who died intestate in Knox county, Illinois, possessed of large tracts of land situate in Phelps, Buffalo and Dawson counties, Nebraska. The personal property was insufficient to pay the debts allowed against the estate and the administrators applied to the district court for Phelps county for license to sell the Nebraska lands for that purpose. In due course a decree was entered in the district court granting leave to sell as prayed, and after due advertisement the lands were struck off to Lewis Anderson, the defendant in error, at \$14 per acre. Before making any payment to the administrators, Anderson assigned his bid to George N. Hamilton for \$2,200, and Hamilton, upon investigation, found that one eighty-acre tract had been misdescribed throughout the entire proceedings; that the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of section 17, township 8, range 18, belonging to the Hawkinson estate, had been omitted, and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the same section, which did not belong to the estate, had been included. Upon discovering this error some discussion was had between Hamilton, Anderson, and the attorney for the administrators, as to the proper steps to be taken in order to correct the error and, as we gather from the record, Hamilton insisted that new proceedings should be taken in court to obtain leave to sell this eighty-acre tract and a written agreement was entered into between Anderson and Hamilton in which it was provided that upon such order and sale being had, if Hamilton was compelled to bid more than \$14 per acre to obtain the land, Anderson would credit the excess as a payment upon the \$2,200 which Hamilton had agreed to pay Anderson for the assignment of his bid. Thereupon application was made to the court for a confirmation of the sale of all the lands properly described in the proceedings, the sale was confirmed, the purchase price was paid by Hamilton, and deed executed to him. Thereafter the administrators ap-

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plied and obtained leave of court to sell the omitted eighty-acre tract; a sale was duly had, and Hamilton was compelled to bid \$25.10 per acre to obtain the land. This sale was reported to the court and confirmed and Hamilton paid the purchase price to the administrators in Knox county, Illinois, and received his deed and afterwards Anderson commenced this proceeding in the district court for Phelps county, Nebraska, by filing what is entitled "Application for Portion of Proceeds of Sale," in which the foregoing facts are substantially set out and in which the circumstances leading up to the second application to sell the omitted tract is stated in the following language:

"Thenafter, and prior to the report of said sales by the administrators, it was discovered that the said S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section seventeen (17) had been erroneously described in the proceedings leading up to said sale, and in the notice of such sale being described as the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section, when, in fact, the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ was not a part of said ranch, and thereupon it was agreed by and between the said administrators and the said Rebecca Hamilton and George N. Hamilton and your petitioner, that in order to give the purchaser herein a good title to said S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section seventeen (17), it would be necessary to amend the proceedings herein leading up to the license, and to readvertise and sell the same, and it was therefore agreed between the above named parties that the sale of the balance of said ranch should be confirmed and the deed taken therefor by the purchaser, or his assignee, at the price of fourteen (\$14) dollars per acre, and that the said S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section seventeen (17) should be readvertised and sold, not for the purpose of bringing a higher or better price, but merely for the purpose of getting a good title to the same for the purchaser at the first sale, and in pursuance of such agreement the administrators reported that they had sold all of said ranch other than the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section seventeen (17) which was omitted from

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the return of sale to your petitioner, and that your petitioner had assigned his bid to the said Rebecca Hamilton and George N. Hamilton, which said sale was afterwards on November 22, 1899, confirmed by this court, this court having theretofore, on September 29, 1899, entered an order allowing the petition herein to be amended by interlineation so as to properly describe the said S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section seventeen (17), and ordered the same sold, in which order it was stated that the said eighty had been included in the former sale to your petitioner, and thereafter the said administrators readvertised the sale of the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section seventeen (17) and the sale thereof was held on January 26, 1900, at which sale the parties to the former sale were present and the said eighty was purchased by the said Rebecca and George N. Hamilton, they however necessarily bidding therefor at the rate of twenty-five and 10-100 (\$25.10) dollars per acre instead of fourteen (\$14) dollars, the original selling price thereof, such increased bid being necessary by reason of the fact that the administrators at said sale announced that they had a written bid thereon at twenty-five (\$25) dollars per acre from a man named Craig, a son of one of the administrators herein."

The relief asked is that the administrators be required to pay to Anderson out of the proceeds of the sale, the sum of \$853.36, the excess over \$14 per acre for which the eighty-acre tract sold. The court ordered such payment made and the administrators have taken error to this court.

The defendant in error insists that the land was sold in a body at \$14 per acre and was supposed to include the eighty acres afterwards sold at the increased price. The court also found that this eighty was supposed to be included in the first sale, and it is now insisted that this eighty, being proportionately of greater value than the balance of the tract, induced the bid of \$14 per acre for the whole tract, and that as between Anderson and the estate, equity requires that he should be reimbursed for the difference.

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We see two difficulties in the way of allowing him this relief: When it was ascertained that this eighty acres was not properly included in the first sale the purchaser, or those claiming through his bid, should not have consummated the sale and procured its confirmation as to all except this eighty unless they were satisfied to take the land at \$14 per acre, the amount of the bid. The law is well settled that an administrator can not make contracts in his representative capacity that will bind the estate, and even had the administrator agreed with Anderson and Hamilton that the omitted eighty should be advertised and sold at the same rate per acre bid for the balance of the tract, which we think is not established, they were chargeable with notice that the administrators had no authority to make such an agreement. The claim of Anderson is not made against the administrators personally but against the assets of the decedent's estate, and we think it too plain for argument that the district court has no jurisdiction to allow such a claim. The district court has no original jurisdiction to allow claims against the estate of a decedent, and while this money may have been within the jurisdiction of the district court, it came into its possession by the court being the mere agent or instrument by which the real estate of a decedent was converted into money for certain specific purposes, viz., the payment of debts.

We think, therefore, that the court had no jurisdiction to allow this claim, and even if it had jurisdiction in the matter, the defendant in error had waived any claim to this particular eighty which he supposed was included in the sale made to him, by consenting to a confirmation of the sale of the other lands offered and bid in by him. We recommend a reversal of the judgment of the district court.

AMES and ALBERT, CC., concur.

REVERSED AND REMANDED.

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THE FARMERS BANK, APPELLANT, v. MARGARET NORMAND
ET AL., APPELLEES.

FILED NOVEMBER 19, 1902. No. 12,177.

Commissioner's opinion. Department No. 1.

1. **Mortgages: FORECLOSURE: INSANITY OF MORTGAGOR: EVIDENCE.** Evidence examined, and *held* to support a finding that the mortgagor was mentally incapable of contracting when plaintiff's alleged mortgages were executed.
2. **Mortgages: FORECLOSURE: MARRIED WOMEN.** *Held.* No error to refuse to enter judgment, in a foreclosure suit, against her on notes signed by a married woman where there was evidence tending to show that she had no intention to bind her separate estate.
3. **Mortgages: FORECLOSURE: INSANITY: CANCELLATION: FRAUD: FAILURE TO PLEAD DEFENSES: JUDGMENT REFUSED.** Where the mortgages sought to be foreclosed were canceled for mental incapacity of the mortgagor, on a general finding for defendants and where fraud in the inception of the notes was pleaded and their consideration denied, it is not error to refuse to enter judgment for the amount of the notes against the mortgagor's estate, although its administrator did not set up the defenses, and they appear only in the answers of his widow and heirs.

APPEAL from the district court for Otoe county. Tried below before JESSEN, J. *Affirmed.*

E. F. Warren and *A. J. Sawyer*, for appellant.

W. F. Moran, D. W. Livingston, John C. Watson, John V. Morgan and *Samuel M. Chapman*, *contra.*

HASTINGS, C.

This is an appeal from a decree dismissing suits to foreclose two mortgages. March 17, 1900, the plaintiff filed in the district court for Otoe county two separate actions, each brought to foreclose a mortgage upon real estate in that county, and in the first action was included a foreclosure upon 6,075 shares in Missouri Valley Hedge Company; the first petition alleged that there were due \$1,683.33 and interest upon the notes secured by the mort-

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gage, and that \$2,000 and some interest had been paid. This, though the first action, is upon the second mortgage. The second petition claimed that the mortgage was given to secure three notes, dated May 3, 1898, one of \$2,845 and interest from February 21, 1898, at ten per cent., due in one year, a second note for like amount, and same rate of interest, due in two years, and the third for \$2,846 and same rate of interest, due in three years, and that nothing had been paid upon any of the three. On motion of defendants, the two actions were consolidated. The defendant Margaret Normand then answered alleging that, if the promissory notes and mortgages were in fact ever executed, it was while Julius Normand was of unsound mind and incapable of executing or understanding them, as plaintiff well knew; she also alleged that the notes and mortgages were obtained by the plaintiff and others in collusion with it by fraud and misrepresentation; that one Dunnigan arranged with Normand to set out an orchard on about seventy acres of land owned by the latter and to take as compensation the first crop of fruit after five years, and did set out some fruit trees on Margaret Normand's land over her protest, and on February 21, 1898, in pursuance of a design to cheat and defraud Normand and his wife, Dunnigan presented two papers which he represented were a contract and a duplicate such as had been agreed upon, and by this means procured the parties to sign two papers, which were not contracts in duplicate as Dunnigan stated, but notes, one for \$4,000, and one for \$4,536, each due five months after date with ten per cent. per annum interest; that these notes were procured with intent to defraud, and were by the said Dunnigan immediately transferred to the plaintiff; that the bank at the time they were so transferred knew that they had been obtained by fraud and misrepresentation, and took them to aid the fraud; that Normand at the time was of unsound mind and unable to comprehend what he was doing, and afterwards on May 3, 1898, plaintiff's president and its cashier, by arrangement with the payee, presented these

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notes to Normand and his wife, and represented that if a mortgage was not given to secure them other creditors would seize upon and sacrifice his property, and if Normand would give a blanket mortgage on all of his land, the bank would hold it and it would not hurt Normand and would keep the other creditors off until he could pay his debts, and induced Normand to take up the two notes previously given and give the three notes secured by one of the mortgages plaintiff was foreclosing; that the bank immediately on the following day filed this mortgage of record and claims that it is a valid and subsisting lien upon three quarter sections of land in Otoe county; that the bank procured these notes and mortgages in pursuance of the plan to cheat and defraud Normand and his wife. Mrs. Normand further answered that in January, 1898, eight notes as follows were executed and delivered to the Missouri Valley Hedge Company by Normand, viz.: \$150, dated October 13, 1897, due October 13, 1899; \$150, dated September 20, 1897, due September 20, 1899; \$666.66, dated January 17, 1898, due January 17, 1900; \$150, dated September 20, 1897, due September 20, 1898; \$200, dated September 20, 1899, due September 20, 1900; \$666.66, dated January 17, 1898, due January 17, 1901; \$1,233.33, dated November 30, 1897, due November 20, 1898; \$666.66, dated January 17, 1898, due January 17, 1899; that these notes were obtained by fraud and with intent to defraud Normand, and that at the time they were made, the latter was in such a demented condition, and so remained up to the time of his decease, as to be wholly unable to understand the nature of the instruments or to assent to them; that at some time afterwards the Hedge company transferred these notes also to the plaintiff and that it well knew that they were fraudulently obtained and that Normand was of unsound mind, and on or about the 7th day of May, 1898, plaintiff's cashier went to Normand's home, in pursuance of the plan to cheat and defraud him and his wife, procured him to execute and deliver to the bank the mortgage set out in the first of

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plaintiff's actions and immediately recorded the mortgage and still claims it is a valid and subsisting lien, although they well knew at the time that Normand was in such a demented condition that he could not understand any of the transactions and was incompetent to assent or enter into them. Mrs. Normand also alleges that on the 3d day of May, 1898, Normand paid to Enyart and Catron, the plaintiff's president and cashier, \$3,000 in money without any consideration therefor and while he was wholly incompetent to understand the transaction or assent thereto, and also turned over to said plaintiff two notes made by John Paulson to said Normand, dated February 23, 1893, and due March 23, one for \$2,400 and one for \$400, each bearing 10 per cent. per annum interest; she also says that at the time of the signing of these several instruments she was a married woman and the wife of Julius Normand, deceased, and that the one quarter section of land was and still is her homestead and place of residence; that the northeast quarter of section 7, township 7, range 13, which is included in both mortgages, was at the time her separate property and owned and occupied by her as a homestead; that the mortgages were represented to her by both the president and cashier as blanket mortgages covering only lands of Julius Normand and as not affecting the land owned and claimed by her; that she was an illiterate person who can neither read nor write except her own name; that the mortgages had not been read, and in signing them she relied wholly upon the representations of the president and cashier; that she is not and never has been indebted to the plaintiff in any sum whatever and that if any debts exist in favor of the plaintiff, it is Julius Normand's and not hers, and her signature on the notes, if it is there, is merely that of a surety; she says that at the time of these transactions, and for a long time before, the plaintiff's president, Enyart, was and has been a confidential adviser of Normand and his family, and by reason of the confidence reposed in him was able to successfully carry out the plan for defrauding Normand;

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she also denied plaintiff's allegations so far as they were not admitted. She asked for a judgment in favor of the Normand estate for \$3,000 and the return of the \$2,800 of Paulson's notes or a judgment for the amount and a cancellation of the notes and mortgages.

The guardian *ad litem* for Julius Normand, Jr., answered that the notes and mortgages were procured by fraud and false representations of the plaintiff and denied plaintiff's allegations. Six children and heirs of Julius Normand deny plaintiff's allegations and allege that the notes, if ever executed, were executed while Normand was of unsound mind and unable to understand or assent to them; they also allege as to the manner of their procuring as set forth in Mrs. Normand's answer. After the other proceedings were made up, H. J. Leigh, as administrator of the estate of Julius Normand, filed a separate answer setting forth that he is the regularly qualified and acting administrator and denying plaintiff's allegations.

The issues thus made up, the court "Finds on the issues joined for the defendants and against the plaintiff and the court further finds at the times the mortgages described in the petitions and answers were signed by Julius Normand, he was of unsound mind and incompetent to transact business. It is therefore considered and adjudged by the court that the said mortgages be, and the same are, hereby set aside, annulled, canceled, vacated and declared to be of no force or effect in law or equity; * * * and that this action be dismissed at cost of plaintiff."

Afterward a motion was filed on behalf of plaintiff for judgment against Margaret Normand upon the notes secured by the mortgages, on the grounds, first, that the evidence showed that she had executed each of the notes and was liable as maker; second, that she had interposed no defense against her liability on the notes; third, that the undisputed evidence was that she executed and delivered them and was liable on them; fourth, that the court having jurisdiction of defendant's person was competent to render judgment on the notes and end the litigation;

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fifth, that it was competent for and the duty of the court to render judgment on the notes against her even though the mortgages were annulled and set aside. Plaintiff also filed a motion for judgment against H. J. Leigh, administrator of Julius Normand, on the same grounds. Both of these motions were overruled, and the plaintiff thereupon brought the action to this court by appeal as above stated.

On the appeal it is claimed first, that the decree should be set aside and a decree of foreclosure entered on both mortgages for the plaintiff, on the ground that the evidence fails to show that Julius Normand was, as the court found, of unsound mind and incompetent to make them; for the second reason, that there is nothing to show that the plaintiff had any knowledge of any mental unsoundness on his part, and third, for the reason that the contract on plaintiff's side was executed, and the consideration of the mortgages furnished and no attempt had been made to put the plaintiff in *statu quo*.

A somewhat careful examination of the entire record leads to the conclusion that the district court was quite warranted in making its finding as to want of capacity on the part of Normand to make these conveyances. It seems clear from the evidence that Julius Normand, who died in January, 1899, at the age of 68, was, at the time of these transactions, suffering from serious mental aberration, whether from senile dementia, or as the result of physical weakness from excessive use of alcohol, or Bright's disease of kidneys, it is not necessary to determine. In August, 1898, a guardian was appointed to manage his business and his condition at that time seems clearly to have been such as to call for such action, and the testimony indicates that it was not materially better May 3, and May 7, when these mortgages were respectively executed. It appears that he was at that time frequently unable to recognize the members of his own family; would declare his intention to leave that dirty hotel and go home while in his own house; had hallucinations as to noises and appearances, and the days when these mortgages were made

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was unable to take any real part in the negotiations. The only witness who denies this last statement is the plaintiff's cashier, by whose procurement the taking of the mortgages seems to have been brought about. He is the only witness who described any but a passive participation on Normand's part in the making of the mortgages. It is true that others express the opinion that the deceased was then competent to understand the transaction, but they fail to tell of any active participation in it by him. The finding of the trial court that he lacked capacity to execute valid securities upon his property at that time can not be reversed as not supported by the testimony.

The general finding of the issues in favor of the defendants must certainly be held to include a finding that the plaintiff was a party to the alleged frauds by which these notes and mortgages were obtained. The answers impeach all of these securities and it cannot be said that these allegations are not supported by the evidence. Plaintiff was thoroughly aware in each case of the nature of the consideration given both by the Hedge company and by the fruit-tree seller for the notes in question; the obtaining of any consideration for these notes is denied in the answers both of Mrs. Normand and of the heirs. The findings of the district court are therefore enough to amply warrant all of the relief granted in cancelling the mortgages and in dismissing the present action.

Counsel for appellant, in their claim that the consideration of these securities is not impeached in the pleadings, overlooked the denial of their allegations, among which is that of a consideration for these notes. The evidence that the tree notes for \$1,000 and for \$4,535 were obtained by fraud, is not contradicted. There is sufficient in the record to warrant a finding that their renewal by plaintiff into the three notes secured by the first mortgage, and the mortgage itself, were fraudulent. They seem also to overlook Mrs. Normand's denial of any intention to bind her separate estate, which also is supported by evidence in the record. The court, therefore, was warranted in refusing

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to render any judgment against Mrs. Normand, and certainly was warranted in refusing the judgment against the estate of Julius Normand for these notes; he was at least as incompetent to make them as he was to execute the mortgages; whether or not the court should have given an order cancelling these notes, it is not necessary to determine, as no appeal has been taken by the defendants and the plaintiff can not complain because its notes were not canceled as well as its mortgages.

Counsel urge, with great energy, the proposition that the consideration for these securities having been received by Normand, the instruments are not void unless the other party had notice of his incapacity. Aside from their impeachment of the consideration for fraud of the large notes, we are inclined, in regard to this, to adopt the note cited for appellant on page 33 of its brief: "One dealing with an insane person, and not knowing his condition or any facts to put him on his guard, will be protected by the courts of law and equity against such person's repudiating his contract on the ground of mental incapacity; but the rule is not a technical one to be relied upon at all times and under all circumstances. It is applied in each case only to prevent a wrong being done and is based on the principle that 'the law will not permit the lunatic's infirmity to be made an instrument of fraud.'" Anson, Contracts [2d ed.], 151, note. In this case the knowledge of the plaintiff's officers of the condition of the party they were dealing with appears to have been ample, and their opportunity for knowing his true mental condition sufficient. The precautions which they took in the dealings with him indicate that they themselves recognized that they were entering upon hazardous contracts. That the district court was dealing with them with sufficient leniency in merely cancelling their mortgages and refusing to enter any judgment on the notes seems clear.

If the defenses set up by Mrs. Normand and the heirs were found sufficient to do away with the mortgages, with the consideration of the notes impeached as thoroughly as

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it was, it would seem wholly useless to ask a court of equity to enter judgment against the maker's estate, against which the notes had never been presented, merely because the administrator had not plead the same defenses.

It is recommended that the decree of the trial court be affirmed.

KIRKPATRICK, C., concurs.

AFFIRMED.

H. G. SHOEMAKER, APPELLEE, v. VICTOR GOOD, JR., ET AL.,
APPELLANTS.

FILED NOVEMBER 19, 1902. No. 12,179.

Commissioner's opinion. Department No. 3.

Mortgages: FORECLOSURE: APPRAISAL.

APPEAL from the district court for Custer county.
Tried below before SULLIVAN, J. *Affirmed.*

N. T. Gadd, for appellants.

L. E. Kirkpatrick, contra.

AMES, C.

This is an appeal from an order confirming a judicial sale of real property under a decree of mortgage foreclosure. There are two objections; one that the action was prosecuted without reciting the full given name of the plaintiff but with the use of the initial letters thereof only. We think this objection comes too late after final judgment. The other objection is that the appraisers chosen by the sheriff were not sufficiently shown to have been freeholders of the county; but the officer's return describes them as having been such, and we think this recital is conclusive, at least in the absence of a counter-showing.

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It is recommended that the order appealed from be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

M. FRANK DONOVAN v. WILLIAM A. HIBBLER.

FILED NOVEMBER 19, 1902. No. 12,184.

Commissioner's opinion. Department No. 3.

1. **Pleading: AMENDMENTS: DISCRETION.** It is not an abuse of discretion for a court to allow a formal amendment to a pleading during the progress of a trial, in the absence of a showing that such amendment was prejudicial to a party objecting thereto.
2. **Depositions: CERTIFICATE OF NOTARY: OBJECTIONS.** It is not a sufficient objection to the reading of a deposition in evidence that the officer before whom it was taken does not certify that the witnesses were sworn as well after as before testifying.
3. **Depositions: TERM TIME OF COURT, TAKEN DURING.** In the absence of a statute or standing court rule forbidding the taking of depositions during a term time of the court in which the cause is pending, the fact that they are so taken is not ground for suppressing them.

ERROR from the district court for Box Butte county.
Tried below before WESTOVER, J. *Affirmed.*

R. C. Noleman, for plaintiff in error.

W. G. Simonson, contra.

AMES, C.

This is an action to recover a money judgment for several items, among them being \$23.10 for day board, or meals. The petition alleges that the board was furnished for a contract price per meal, but after the jury had been impaneled the court permitted an amendment so as to change the ground of recovery from contract to a *quantum valcbant*. The defendant objected to the amendment and

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excepted to the order allowing it, and assigns the latter here as an abuse of discretion by the trial judge. He does not, however, make it appear that he was in any way misled or prejudiced by the ruling complained of; and, in the absence of such a showing, it is difficult to understand in what way the court was guilty of an abuse of discretion, or, if he was so guilty, in what way the plaintiff in error suffered an injury entitling him to complain.

A second assignment of error is the admittance in evidence of certain depositions, which were objected to when they were offered on the trial for the reason that the officer before whom they were taken did not certify that the witnesses were sworn as well after as before testifying. We do not know of any provision of law requiring such certification. The taking of depositions out of court is a purely statutory proceeding, and the court has no power to exact an authentication of them supplemental to that prescribed by the statute.

A third assignment of error is, the denial by the court of a motion to suppress another deposition, because it was taken in term time and while counsel for plaintiff in error was engaged in the trial of another cause. However reprehensible such a practice may be, counsel has called to our attention no statute or standing court rule forbidding it, and we think one can not be supplied by the court after the fact. There was no showing that the plaintiff in error suffered any specific or unavoidable prejudice by reason of the circumstances. If there had been such a showing it would have been within the discretion of the court to continue the case, if asked so to do, in order to afford counsel an opportunity for cross-examination or to take such other course as might promise to repair the damage. The plaintiff below recovered a verdict and judgment. No errors other than those above mentioned are assigned.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

Perry Live Stock Commission Co. v. Barto.

THE W. J. PERRY LIVE STOCK COMMISSION COMPANY V. J.
M. BARTO ET AL.

FILED NOVEMBER 19, 1902. No. 12,200.

Commissioner's opinion. Department No. 3.

Chattel Mortgages: FORECLOSURE: REPLEVIN: IDENTITY OF PROPERTY:
DIRECTING VERDICT. In an action for the recovery of specific personal property, where the plaintiff claims under a chattel mortgage, if, from the pleadings and the evidence, it is impossible to ascertain whether the property seized under the writ is the identical property covered by the mortgage, the plaintiff cannot recover.

ERROR from the district court for Sheridan county.
Tried below before WESTOVER, J. *Affirmed.*

A. G. Fisher and W. W. Wood, for plaintiff in error.

C. Patterson, contra.

ALBERT, C.

This is an action in replevin, brought to recover the possession of 600 head of native ewes and 500 head of native lambs, in which the plaintiff claimed a special property by virtue of a chattel mortgage. At the close of the testimony the court directed a verdict for the defendant Barto, and gave judgment accordingly. The plaintiff brings error.

In the mortgage under which the plaintiff claims, the property is described as follows:

"(600) head of native ewes from one to four years old ave. weight 100 pounds and all branded with one of the following brands thus (M) (D) (◇) on back; also 500 head of native lambs average weight about fifty-five pounds and all branded thus (∞) on shoulder or hip, the above described sheep are now located and must be kept on our ranch 10 miles south of Gordon, Nebraska, until in a marketable condition; and when removed must be shipped

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to the W. J. Perry Live Stock Com. Company, So. Omaha, Nebraska."

The principal error complained of is the action of the district court in directing a verdict. In directing a verdict the court proceeded on the theory that the mortgage was void for uncertainty of description of the property covered thereby. The plaintiff contends that there is evidence to the effect that the mortgagor had no other sheep or lambs on the ranch answering the description given in the chattel mortgage, and that the description, therefore, is sufficiently certain. But this contention is not borne out by the record. The evidence not only fails to show there were no other sheep and lambs answering such description, but conclusively shows the contrary. This is an action for the recovery of specific personal property. The plaintiff is not entitled to recover, unless it is shown by a preponderance of the evidence that he is entitled to the possession of the specific property claimed. So long as the description is so indefinite and uncertain that it is impossible to ascertain from the record whether the property seized under the writ is the identical property covered by the mortgage, the plaintiff must fail in his action. That is the state of the record in this case. The plaintiff, however, argues that, as all sheep and lambs look very much alike, the case is analogous to an action in replevin for the recovery of a specific number of bushels of grain mingled with a greater number of bushels of the same kind. That proposition is untenable; while it is true all sheep do look very much alike, yet the resemblance is hardly so striking as that of one bushel of grain to another bushel of the same kind. The case is clearly within the rule reiterated in *Union State Bank v. Hutton*, 61 Neb., 571.

Complaint is made as to the rejection of certain evidence offered by the plaintiff; but as such evidence, had it been admitted, would not have cured the defect in the mortgage hereinbefore pointed out nor have entitled the plaintiff to a verdict, its exclusion, if error, is error without prejudice.

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It is recommended that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

ERNST BIANKI, BY ANTON BIANKI, HIS NEXT FRIEND, V.
GREATER AMERICAN EXPOSITION ET AL.

FILED NOVEMBER 19, 1902. No. 12,209.

Commissioner's opinion. Department No. 2.

1. **Nuisance: EXPLOSIVES: NEGLIGENCE.** In giving a fireworks exhibition, it is not unlawful or a nuisance *per se* to shoot off sky-rockets, bombs and other explosives in a careful and suitable manner upon one's own premises.
4. **Nuisance: EXPLOSIVES: PLEADING: DAMAGES.** A petition, by which it is sought to make one liable in damages for doing an unlawful act or maintaining a public nuisance, must state sufficient facts to overcome the presumption that the act complained of was lawful, or show that the doing of the act itself amounted to a public nuisance.
3. **Explosives: NEGLIGENCE: CORPORATIONS.** It is negligence for a corporation giving a fireworks exhibition on its own grounds, to use dynamite bombs and other explosives which are so improperly prepared and manufactured that they will not explode while in the air and fire or propel them into the air at such an angle that they will fall outside of its grounds upon public or private premises and permit them to remain where children and persons unacquainted with their dangerous nature can pick them up, handle them and thus cause them to explode to their injury and damage.
4. **Explosives: NEGLIGENCE: CORPORATIONS: ACTS OF AGENT.** A corporation which employs an agent to give such an exhibition will be held liable for the negligent acts of its agent, unless relieved from such liability because the person so employed is an independent contractor.
5. **Corporations: INDEPENDENT CONTRACTOR: DAMAGE FROM EXPLOSIVES: PLEADING.** *Held,* That the facts stated in the plaintiff's petition were not sufficient to show that the corporation employed was an independent contractor within the meaning of the law, and that such defense was not raised by demurrer.
6. **Corporations: EXPLOSIVES: NEGLIGENCE: PERSONAL LIABILITY OF DIRECTORS.** The directors of a corporation, by the mere act of

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employing another to give a fireworks exhibition for and on behalf of such corporation on its own grounds, are not made personally liable for the negligent acts of the person thus employed to give such exhibition.

7. Parties: DEFECT OF: OBJECTION AFTER SUBMISSION. The objection that there is a defect of parties, in this court, must be made before the case is finally submitted on its merits or it will be considered waived.

ERROR from the district court for Douglas county. Tried below before SLABAUGH, J. *Affirmed in part, reversed in part.*

Weaver & Giller and F. T. Ransom, for plaintiff in error.

Managing agents of corporations are personally liable for their tortious acts done in the name of the company. *Nunnally v. Southern Iron Co.*, 94 Tenn., 397, 28 L. R. A., 421; *Mayer v. Thompson-Hutchison Building Co.*, 28 L. R. A. [Ala.], 433; *Cameron v. Kenyon-Connell Commercial Co.*, 44 L. R. A. [Mont.], 508; *Jenne v. Sutton*, 14 Vroom [N. J.], 257, 39 Am. Rep., 578.

Smyth & Smith, Hamilton & Maxwell and George E. Pritchett, contra.

When a contract may be performed lawfully, as well as in violation of law, it is valid, in the absence, at least, of proof that the intention of both parties was that the law should be violated. *Shedlinsky v. Budweiser Brewing Co.*, 57 N. E. Rep. [N. Y.], 620; *Kerley v. Mayer*, 31 N. Y. Supp., 818; *Dowley v. Schiffer*, 13 N. Y. Supp., 552; *Favor v. Philbrick*, 7 N. H., 326; 15 Am. & Eng. Ency. Law [2d ed.], pp. 937, 938, citing *Waugh v. Morris*, 8 L. R. Q. B., 202.

The petition does not charge the defendants in error with either malfeasance or misfeasance, but with nonfeasance. The directors of a corporation are not personally liable in such case. Story, Agency [9th ed.], sections 303, 308; *Greenberg v. Whitcomb Lumber Co.*, 28 L. R. A. [Wis.], 439; *Murray v. Usher*, 117 N. Y., 542; *Van*

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Antwerp v. Linton, 89 Hun [N. Y.], 417; *Burns v. Pethcal*, 75 Hun [N. Y.], at page 443; *Carey v. Rochereau*, 16 Fed. Rep., 87; *Delaney v. Rochereau & Co.*, 34 La. Ann., 1123; *Feltus v. Swan*, 62 Miss., 415; *Henshaw v. Noble*, 7 Ohio St., 226; *Labadie v. Hawley*, 61 Tex., 177; *Reid v. Humber*, 49 Ga., 207; *Brown v. Lent*, 20 Vt., 529; *Mechem*, Agency, sections 539, 569; 1 Am. & Eng. Ency. Law [2d ed.], 1131; 1 Parsons, Contracts [7th ed.], 65; 1 Beach, Private Corporations, pp. 418, 426; Bishop, Non-Contract Law, section 628; 3 Clark and Marshall, Corporations [2d ed.], section 569; 3 Thompson, Corporations, section 4091.

BARNES, C.

This action was commenced in the district court for Douglas county for the plaintiff, who was at that time a minor of the age of five years, by his next friend, against the Greater American Exposition, Pain's Fireworks Company, Peter E. Iler, William Hayden and James B. Kitchen, to recover damages alleged to have been sustained by him by reason of the improper management of the fireworks display, or pyrotechnical exhibition, given by the exposition in July, 1899. Pain's Fireworks Company was not served with summons, and has never appeared in the action. The defendants, the Greater American Exposition, Peter E. Iler, William Hayden and James B. Kitchen, appeared in the action, and each filed a separate demurrer to the plaintiff's third amended petition. All of the demurrers were sustained; the plaintiff elected to stand upon his petition, refused to further plead; judgment of dismissal was entered in favor of all of said defendants, and the plaintiff thereupon prosecuted error to this court.

It is alleged in the petition herein that the court erred in sustaining each of the several demurrers and in dismissing plaintiff's action as to each of the defendants. The petition in the court below charged that the defendants, the Greater American Exposition and Pain's Fire-

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works Company, were and are corporations; and that during all of the times set forth therein the Greater American Exposition was engaged in giving exhibitions at its grounds in the city of Omaha, and was engaged in the business of furnishing instruction and amusement for a consideration to all persons who might visit the grounds; that as a part of said amusement defendant, Greater American Exposition, employed, hired and permitted the defendant, Pain's Fireworks Company, to shoot, throw and propel, from its said grounds, fireworks, consisting of sky-rockets, dynamite bombs and other dangerous explosives up into the air to a great height for the purpose of being then and there exploded; that the defendants, Peter E. Iler, William Hayden and James B. Kitchen, were directors in said defendant corporation, the Greater American Exposition, and they each individually and personally while acting as such directors, and while acting on the executive committee of the said last named corporation, hired, employed, directed and procured the defendant, Pain's Fireworks Company, to shoot, throw and propel from said exposition grounds and premises, fireworks consisting of sky-rockets, dynamite bombs and other dangerous explosives, all of great and dangerous explosive power, up into the air to be then and there exploded, which acts of said defendants were in violation of and contrary to an ordinance of the city of Omaha, a copy of which was attached to the petition, and marked exhibit "A." And it was further alleged that all of said acts were done without the permission of the city of Omaha or the mayor thereof. The ordinance in question reads as follows: "Section 29. If any person shall unnecessarily discharge any fire-arm, or shoot off any fire-cracker or other fireworks, or shall light or throw any fire-ball or cracker in said city without the permission of the mayor, such person so doing shall, on conviction thereof, be fined in any sum not exceeding \$20. The city council may, by resolution, suspend the operation of the above provision of this section on the Fourth of July, or any other day of public rejoicing."

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It was further alleged that all of said acts, aside from being a violation of said ordinance, were and constituted a continuing nuisance, and were a menace and injury to people residing or being near said exposition grounds. It was further alleged that said explosives were manufactured by said defendant, Pain's Fireworks Company, and that some of said explosives were so carelessly, negligently and improperly made and constructed that they failed to explode when so fired up into the air as aforesaid, and that some of said explosives were so carelessly and negligently fired, thrown and propelled, handled and permitted to be so carelessly and negligently thrown, fired, propelled and handled by defendants that they fell in said unexploded condition outside of the grounds and premises of defendant, Greater American Exposition, and upon the ground and premises of persons living in the immediate neighborhood where they were carelessly and negligently permitted by defendant to remain; that to shoot, throw and propel dynamite bombs and other explosives into the air that were so improperly, carelessly and negligently made and constructed at such an angle as to cause them to fall outside of the grounds and premises aforesaid, and on the grounds and premises of citizens living adjacent to and in the neighborhood of said exposition grounds and where they were liable to be picked up and handled by children, was careless, negligent, and a dangerous thing to do; and that said defendants were careless and negligent in so doing and in permitting said acts and things to be so done and performed at said place as aforesaid. Plaintiff says "that on the 22d day of July, 1899, he was living with his parents on the corner of Commercial and Ames avenue and two blocks north of the exposition grounds aforesaid; that while playing in his father's yard and on his father's premises on the evening of said date he picked up one of said unexploded bombs aforesaid from said grounds and premises belonging to his father, and being wholly unaware of any danger and without any manner of negligence on the plaintiff's part, began to

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handle and examine the same, when suddenly, without any warning, said bomb exploded in plaintiff's left hand." The petition further set forth the effects of said explosion and the injuries caused to the plaintiff thereby, and concluded with a prayer for a judgment against the defendants for \$10,000 and costs of suit.

The defendants having demurred separately it will be necessary for us to examine the petition with reference to the liability of each of them without regard to the liability of his co-defendants. It is evident that the plaintiff framed his petition on the theory that the act of shooting off and exploding the fireworks and dynamite bombs described therein was unlawful, or a violation of law, and was a public nuisance *per se*. Therefore, the first question for us to determine is, whether the facts stated in the petition, in the manner therein set forth, show a violation of law, or constitute a public nuisance. The petition charges that the Greater American Exposition employed, hired and permitted the defendant, Pain's Fireworks Company, to shoot, throw and propel from its grounds fireworks consisting of sky-rockets, dynamite bombs, and other dangerous explosives up into the air to a great height for the purpose of being then and there exploded, for the purpose of furnishing instruction and amusement for a consideration to the persons who might visit its grounds. It is further alleged that defendants, Iler, Hayden and Kitchen were directors of the defendant, the Greater American Exposition, and that they each individually and personally, while acting as such directors and upon the executive committee of the corporation, hired, employed, permitted and procured defendant, Pain's Fireworks Company, to shoot off, throw and propel from the exposition grounds the fireworks and explosives above described; that said acts were done in violation of an ordinance of the city of Omaha, which ordinance is attached to and made a part of the petition, and is quoted above. The petition fairly charges that the defendants, the Greater American Exposition, Peter E. Iler, William

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Hayden and James B. Kitchen, hired and procured the defendant, Pain's Fireworks Company, to give the exhibition complained of. It can scarcely be said that it was necessary for them to obtain permission of the city or mayor for that purpose. It is not alleged that permission was not in fact obtained from the city council or the mayor of Omaha to give the exhibition before it was in fact given. The exhibition having taken place upon the private grounds of the Greater American Exposition and not upon the public streets or public grounds of the city of Omaha, it can not be said that the petition, fairly construed, alleges that the act of giving the exhibition itself at the time and place where it was given was an unlawful act. Permission might have been obtained by either the Greater American Exposition itself, or by Pain's Fireworks Company, to give this exhibition after the act of employment occurred and before the exhibition was in fact given; and so long as it is not alleged that such permission was not obtained by either of them the presumption is that it was granted, and that the act performed by the fireworks company was not unlawful. The petition does not allege facts sufficient to constitute the acts complained of a public nuisance. If the fireworks, rockets, bombs, etc., had been properly and carefully manufactured and had been thrown into the air and exploded in a proper and suitable manner upon the grounds of the Greater American Exposition no harm, danger or inconvenience could have resulted to anyone either in or outside of said grounds. Therefore, the act itself, if properly performed, would not be, and was not, a public nuisance. The allegation of the petition in relation to that matter is simply a conclusion of law, and was insufficient to charge the defendants with maintaining a public nuisance. It follows that if the defendants are liable in this case at all they are not liable for a violation of the law, or the commission of unlawful acts, or for the maintenance of a public nuisance, but are liable for the negligent, unskillful and careless performance of an act legal in itself. An examination of the peti-

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tion satisfies us that the allegations are sufficient to constitute an act of negligence on the part of the defendant, the Greater American Exposition. The thing which it employed Pain's Fireworks Company to do for it, while lawful, was a dangerous thing to do, by reason of the means and agencies employed therein. It is beyond question that one engaged in handling fire-arms or fireworks and other dangerous explosives, must exercise a degree of care commensurate with the danger involved. Thomas, Negligence, page 678. It was negligence on the part of Pain's Fireworks Company to so manufacture its explosives and dynamite bombs that they would fail to explode when high in the air and thus eliminate from such exhibition all elements of danger. It was negligence for it to fire, propel and throw such bombs and other explosives into the air at such an angle as would cause them to fall outside of the exposition grounds and upon public or private premises. It was negligence to allow and permit said unexploded bombs to be and remain upon private premises where they might be picked up, handled and exploded by unsuspecting persons, to their injury and damage. It is beyond question that the fireworks exhibition mentioned in the petition was done for and on behalf of the Greater American Exposition. It is alleged that Pain's Fireworks Company was employed by it to give such exhibition. Therefore, according to the allegations of the petition, the fireworks company was its agent. The principal is liable for the acts of his agent within the scope of his authority. This rule depends upon the fact that the relation of principal and agent exists. In this case it was the will of the Greater American Exposition that was exercised; it was its purpose that was accomplished; it derived the benefits and advantages which ensued therefrom; it selected its own agent, the fireworks company, put said company in motion, and had the right to direct and control its actions. It is therefore just and proper that it should be held responsible for what its agent did. Mechem, Agency, section 747. It follows that the

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defendant, the Greater American Exposition, is liable to the plaintiff for the damages sustained as set forth in the petition, unless it is relieved from such liability by the fact that Pain's Fireworks Company was an independent contractor. While it has often been held that the owner of premises, who has put an independent contractor in charge thereof, is relieved from liability for damage to persons injured by the acts of such independent contractor, on the other hand it is the duty of every one who does in person, or causes to be done by another, an act which from its very nature is liable, unless precautions are taken, to do injury to others, to see to it that those precautions are taken; and he can not escape his duty by turning the whole performance over to a contractor. Of the same nature is the duty which the law imposes upon every person who, for his own purposes, brings on his lands and collects or keeps there anything likely to do mischief if it escapes, to keep it in at his peril; and if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape. The distinction is, when the work is one that will result in injury to others unless preventive measures be adopted, the employer can not relieve himself from liability by employing a contractor to do what it was his duty to do, to prevent such injurious consequences. It is one's duty to so conduct his own business as not to injure another, and this duty continuously remains with the employer. According to the allegations of the petition Pain's Fireworks Company was the agent of the Greater American Exposition, and so far as it appears therefrom was not such an independent contractor as would relieve the exposition from liability for the unlawful, negligent and careless act of its said agent. We therefore hold that the petition stated a cause of action against the Greater American Exposition, and its demurrer thereto should have been overruled.

We next inquire as to the liability of the defendants Iler, Hayden and Kitchen. It is alleged in the petition

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that they were the officers and were serving on the executive committee; in other words, the agents of the Greater American Exposition; that acting in such capacity they hired Pain's Fireworks Company to give the exhibition described in the petition for and on behalf of their principal. Having held that the act in itself was not unlawful, or a nuisance *per se*, it remains for us to determine whether or not the mere act of employing Pain's Fireworks Company to give the fireworks exhibition for their principal, the Greater American Exposition, rendered them individually liable to the plaintiff for damages in this case. These defendants, as general agents of the exposition company, employed the fireworks company to shoot off and explode the rockets, bombs and other explosives for and on behalf of their principal. It is not alleged that any specific directions were given by them to Pain's Fireworks Company as to the manner of doing the act complained of. If any directions were given they must have been general. In such a case the agent is not liable for the negligence of the special agent employed to do the work. *Brown v. Lent*, 20 Vt., 529; *Reid v. Humber*, 49 Ga., 207. It is not shown that these defendants took any part in, or had any knowledge of, the manner in which Pain's Fireworks Company manufactured the bombs and explosives, or in which they fired or propelled them into the air from the exposition grounds. It is not shown that they were present while the exhibition was going on, or knew anything about the manner in which it was being conducted. It follows that as to these individual defendants the petition failed to state a cause of action and their demurrers were properly sustained.

It is urged by the defendants that there is a defect of parties in this court, because Pain's Fireworks Company has never been served with a summons in error in this action, and has never appeared herein, that therefore this proceeding should be dismissed and the judgment of the lower court affirmed. This objection was not made or suggested until the final submission of the case upon its

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merits. In *Bates-Smith Investment Co. v. Scott*, 56 Neb., 475, it was held that all parties to a joint judgment must be joined in error proceedings therefrom, and a non-joinder is a fatal defect in the proceedings; but if the objection is delayed until the final submission of the cause on its merits, the defect is waived. We therefore overrule this objection.

For the reasons above set forth we recommend that the judgment of the district court in favor of defendants Iler, Hayden and Kitchen, be affirmed; that the ruling of said court sustaining the demurrer of the Greater American Exposition, and the judgment dismissing plaintiff's action against it, be reversed and the cause remanded for further proceedings.

POUND and OLDHAM, CC., concur.

The judgment as to defendants, Iler, Hayden and Kitchen, is affirmed, and as to the defendant, the Greater American Exposition, said judgment is reversed and the cause remanded for further proceedings.

AFFIRMED IN PART, REVERSED IN PART.

RILEY BROTHERS COMPANY, APPELLANT, v. JAMES MELIA
ET AL., APPELLEES.

FILED NOVEMBER 19, 1902. No. 12,224.

Commissioner's opinion. Department No. 2.

1. Appeal and Error: APPEAL: EFFECT: TRIAL DE NOVO. The perfecting of an appeal to this court from a decree of the district court in a suit in equity, together with the filing and approval of a supersedeas bond, operates to suspend such decree, and the case is thereupon pending here for trial *de novo*.
2. Appeal and Error: APPEAL: TRIAL DE NOVO: MEANING OF. By the perfecting of such appeal the parties are placed in the same situation, and their rights are the same, as they were at the time of the commencement of the action.

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3. **Appeal and Error: APPEAL: EQUITY: DECREE THAT MAY BE RENDERED.** In a suit in equity brought here on appeal this court has full power to render such a decree as it shall find the district court ought to have rendered. Upon a settlement of the matters in controversy by the parties to such action, with the consent of the court, such decree may be rendered as they may agree upon.
4. **Equity: ACTION BASED ON DECREE IN: WHEN MAY NOT BE BROUGHT.** One cannot maintain an action based solely on a decree of the district court, in a suit in equity to which he was not a party, and which decree had been superseded by an appeal to the supreme court at the time his action was commenced, where such decree was not affirmed but was reversed and the suit in which it was rendered was dismissed for want of equity.

APPEAL from the district court for Douglas county.
Tried below before ESTELLE, J. *Affirmed.*

B. N. Robertson, for appellant.

Montgomery & Hall and *Woolworth & McHugh*, *contra.*

BARNES, C.

This is an appeal in equity from a decree of the district court for Douglas county. It is unnecessary for us to set forth the pleadings or their substance, because there was no conflict of evidence on the trial in the lower court, and the record fairly establishes the following state of facts: One Catherine Melia was, in her lifetime, the owner of the undivided one-half of lot 6 in block 225 of the city of Omaha, Douglas county, Nebraska. On the 18th day of August, 1892, she conveyed said premises to one W. W. Phelps, who on that day executed and delivered a conveyance of said property to the Chicago, Milwaukee & St. Paul Railway Company, and the Chicago, Rock Island & Pacific Railway Company, the said W. W. Phelps acting as the representative of the companjes. Mrs. Melia died in October, 1893. In September, 1896, James Melia and Martin Melia, together with the other two heirs of Catherine Melia, instituted a proceeding in equity in the district court for Douglas county to set aside the conveyance made by Catherine Melia upon the ground that at

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the time of the execution of said conveyance she was insane and incompetent to enter into any contract, and that she had received no consideration therefor. Issue was joined in that case, and a decree was rendered by the district court cancelling the said conveyance and quieting the title to the said premises in the heirs at law of Catherine Melia. An appeal from that decree to this court was immediately perfected and a supersedeas bond was duly executed, approved and filed. Subsequently, in July, 1899, and while said case was pending in this court, a settlement of it was effected and a stipulation was entered into by and between the parties thereto, agreeing that a decree should be entered reversing the judgment of the lower court and remanding the cause with directions to the said court to enter a decree dismissing the suit; and at the same time the heirs of Catherine Melia executed a conveyance to the railroad companies, appellees herein. Thereafter, on July 12, 1899, and in vacation, said stipulation was presented to the clerk of this court, who purported to enter a decree reversing the judgment of the court below, and remanding the case with directions to enter a decree dismissing the bill. A mandate was issued by the clerk and filed with the clerk of the district court of Douglas county, and pursuant thereto the district court entered a decree setting aside its former judgment and dismissing the suit. Such was the situation when the present proceeding was instituted. This proceeding was begun by the appellant, which is a judgment creditor of two of the heirs of Catherine Melia, to wit, James Melia and Martin J. Melia; the judgment having been obtained against said heirs during the lifetime of Catherine Melia, and kept alive by the issuance of an execution. In its petition filed herein the plaintiff did not attack the conveyance of Catherine Melia of the premises in question and did not seek to set aside said conveyance, nor did it allege that Catherine Melia was insane at the time of the execution of her deed heretofore mentioned. The petition alleges the facts above stated, and it was claimed therein

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that the clerk of this court had no power to enter a decree in vacation upon the stipulation above mentioned; that such decree was not a decree of this court; that the mandate issued by the clerk in vacation thereon was void, and that the action of the district court pursuant to said mandate, in dismissing the case, was unauthorized and void. After the petition herein was filed, counsel for the railroad companies, appellees herein, presented the stipulation aforesaid to this court in open session; and thereupon the court entered a formal decree in the cause aforesaid pursuant to said stipulation, reversing the judgment of the lower court and remanding the cause to said court with directions to enter a decree dismissing the suit. This decree, so rendered by this court in open session, was duly entered by the clerk, and a mandate pursuant thereto was issued to the district court of Douglas county; which court thereupon, pursuant to said mandate, entered a decree on the 8th day of March, 1901, setting aside, reversing, vacating and annulling its first decree in favor of the heirs in said cause, and dismissing the said cause for want of equity. These proceedings were presented to the lower court in this case by a supplemental answer filed by the railroad companies, appellees. Thereupon the cause came on to be heard and, after a trial and submission thereof, the district court made a finding in favor of the defendants, appellees herein, and entered a decree dismissing the plaintiff's petition for want of equity. From that decree the plaintiff has perfected this appeal.

Appellant now contends that it obtained a lien upon the premises in question by reason of the entry of the decree in the case of the heirs of Catherine Melia against the appellees, and now seeks to have this court enter a decree setting aside the conveyance of the premises in question by Catherine Melia to W. W. Phelps, and subjecting the property to a sale upon execution to satisfy its alleged judgment lien. On the other hand it is contended by appellees that no lien or right whatever exists in favor of the appellant by reason of the proceedings in the former

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case. It will be observed that at the time when this action was commenced an appeal had been duly taken and perfected from the decree rendered in the district court, to this court. This makes it necessary for us to determine the effect of such appeal upon the decree rendered in the court below. It is provided by section 675 of the Code, "That in all actions in equity either party may appeal from the judgment or decree rendered, or final order made by the district court, to the supreme court of the state." It is further provided in section 677, that no appeal in equity shall operate as a supersedeas unless the appellant or appellants shall, within twenty days next after the rendition of such judgment or decree, or the making of such final order, execute to the adverse party a bond with one or more sureties, etc. It will be observed that the appeal was taken in accordance with these sections, was duly perfected and a supersedeas bond given. This operated to suspend the judgment of the court below and bring the case to this court for trial *de novo*. In *O'Leary v. Iskey*, 12 Neb., 136, 10 N. W. Rep., 576, it was held that where an appeal is properly taken and perfected and a supersedeas bond is filed and approved the decree appealed from is vacated and the case is pending in the appellate court for trial *de novo*. In *Wilcox v. Saunders*, 4 Neb., 569, it was held that an appeal in equity is not a remedy to correct errors of law only, but brings the case to the appellate court for trial *de novo*. When an appeal is docketed in the district court the judgment appealed from is vacated and annulled and the litigants are, with respect to their legal rights, where they were at the commencement of the suit. *Jenkins v. State*, 60 Neb., 205, 82 N. W. Rep., 622. It would seem that it is no longer an open question, but is settled beyond controversy, that an appeal in equity to this court, properly perfected with a supersedeas bond filed and approved, suspends the judgment or decree of the district court appealed from, and the case is pending before this court for trial *de novo*, with the rights of the parties where they were at the commencement of the suit.

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The appeal from the decree set forth in appellant's petition having been perfected that decree was vacated and the cause was pending in this court for a trial *de novo* when this suit was commenced. At that time appellant was possessed of no lien upon the premises in question under such vacated decree. It can scarcely be claimed that one can obtain any right whatever under a decree which has been vacated and annulled, and in fact does not exist at the time of the commencement of his action claiming such right.

It is contended, however, that the decree of this court, duly entered upon the stipulation of the parties by which the judgment of the district court was reversed and set aside and said court was ordered to enter a finding and decree for the defendants, appellees herein, and the subsequent action of the district court of Douglas county thereon, are void for want of power in this court to render such decree. We can not agree with this contention. When the former action in equity was properly brought to this court on appeal, it was, as we have before stated, before this court for trial *de novo*. By section 594 of the Code, it is provided that "When a judgment or final order shall be reversed either in whole or in part, in the supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment."

"The supreme court, in reviewing a case on appeal, when the judgment of the district court is for a less sum than the undisputed evidence shows the successful party was entitled to, will enter such a judgment as under the evidence should have been rendered in the court below."

Spence v. Damrow, 32 Neb., 112, 48 N. W. Rep., 880.

"Where an action for the foreclosure of a mortgage has been appealed to this court and the testimony has been preserved by a bill of exceptions so that this court can consider it, in a proper case the court will render a final decree of foreclosure." *National Life Insurance Co. v.*

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Robinson, 8 Neb., 452. It seems to be established, as the law of this state, that this court upon an appeal in equity will try the case *de novo*, upon the record, and enter such a judgment or decree as should have been rendered in the district court. *Western Cornice Manufacturing Works v. Leavenworth*, 52 Neb., 418, 72 N. W. Rep., 592; *Lewis v. Holdrege*, 56 Neb., 379, 77 N. W. Rep., 656; *Roehl v. Roehl*, 20 Neb., 55, 29 N. W. Rep., 257. "Except where the decision of an appellate tribunal necessitates a trial of an issue for which the constitution guarantees a trial by jury, it rests in the discretion of the appellate tribunal, upon the reversal of a judgment, to enter in the appellate court a proper judgment or to remand the case to the court from which it was appealed, either with directions to enter a specific judgment, for a retrial of particular issues, or for a new trial of the whole case. Such discretion should be exercised in such manner as to best and most surely accomplish the ends of justice." *Porter v. Sherman County Banking Co.*, 40 Neb., 274, 58 N. W. Rep., 721.

This court had full power to try the case of the heirs of Catherine Melia against the appellees herein upon its merits *de novo*, together with the power to enter such a decree as it might find was proper under the testimony. It follows that the parties thereto, while said cause was pending here for trial, could settle the differences between them and authorize this court by agreement, the court consenting thereto, to enter such a judgment and decree as they desired. This was done, and the result of it was, not to reinstate the judgment appealed from, but to cause the district court of Douglas county to enter a decree finding for appellees and dismissing the plaintiff's bill for want of equity. We therefore hold that the appellant herein had no lien upon the property in controversy at the time this action was commenced, and has since obtained none by reason of the proceedings in the suit, which is relied upon as a basis of this action. Therefore the judgment of the district court in dismissing the appellant's bill for want of equity should be affirmed.

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As we have before stated, it is not alleged in the appellant's petition that Catherine Melia at the time she made the conveyance mentioned therein, was insane; no sufficient allegations of fraud are contained in said petition to authorize the setting aside the decree of this court or the final decree of the district court in the former action, and it is evident that appellant based its whole claim upon the proceedings in that action. It was not a party to that suit, it was not bound by the decree therein, it obtained no rights thereunder and lost nothing thereby.

We therefore recommend that the judgment and decree of the district court be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

IDA M. JONES, APPELLEE, v. THOMAS I. DUTCH, APPELLANT,
ET AL.

FILED NOVEMBER 19, 1902. No. 12,254.

92 NW 735
Commissioner's opinion. Department No. 2.

1. **Mortgages: FORECLOSURE: REDEMPTION BY JUNIOR MORTGAGEE.** A subsequent mortgagee who has not been made a party to a suit for foreclosure of a prior mortgage has an absolute right to redeem from the purchaser at foreclosure sale.
2. **Mortgages: FORECLOSURE: REDEMPTION BY JUNIOR MORTGAGEE: COSTS.** All that is required of the junior mortgagee in such a case is that he relieve the property of the prior incumbrance by paying the amount thereof with interest; he is not required to pay the costs of the foreclosure suit to which he was not a party.
3. **Mortgages: FORECLOSURE: PURCHASER: BONA FIDES: REDEMPTION: COMPENSATION FOR IMPROVEMENTS.** While a purchaser in good faith at foreclosure sale, who has made improvements upon the property in the belief that he acquired a good title, may claim compensation for such improvements on redemption by a junior mortgagee not barred by the foreclosure, one who buys with notice of the rights and claims of the junior mortgagee, and that his rights have not been divested by the foreclosure, is not entitled to such compensation.
4. **Mortgages: FORECLOSURE: PURCHASER WITH NOTICE: IMPROVE-**

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MENTS: PAYMENT OF JUNIOR MORTGAGE. In such case, the proper course for the purchaser, if he desires the benefit of the improvements, is to pay off the subsequent mortgage of which he had notice at the time he acquired the property.

APPEAL from the district court for Saline county. Tried below before STUBBS, J. *Affirmed.*

Abbott & Abbott, for appellant.

Geo. H. Hastings, contra.

POUND, C.

The property in controversy was subject to two mortgages. The holder of the first mortgage brought a suit for foreclosure, during the pendency of which some negotiations were had toward bringing in the other mortgagee; but the holder of the second mortgage was not joined as a defendant and never in fact appeared in or became a party to the suit. The appellant bought in the property at judicial sale under the decree. Before his sale was confirmed, he had full and actual notice that the second mortgagee, whose mortgage was of record, had not been barred and claimed the right to redeem. Nevertheless he proceeded to make considerable alterations and improvements, incurring an expense much greater than what he had paid for the property and exceeding the aggregate of the incumbrances. When the junior mortgagee sought to redeem, he claimed compensation for these improvements and also demanded the costs of the foreclosure suit. The district court held that redemption might be had upon payment of the amount of the first mortgage and interest, found that the proper sum had been duly tendered, and entered a decree for foreclosure and sale under the second mortgage in default of payment thereof.

We think the decree right in every respect. A subsequent mortgagee who has not been made a party to a suit for foreclosure of a prior mortgage has an absolute right to redeem from the purchaser at foreclosure sale. His

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right to redeem can be cut off only by proper adjudication in a suit to which he is a party; mere notice of the foreclosure proceedings will not so operate. *Cram v. Cotrell*, 48 Neb., 646, 649. All that is required of him in making such redemption is that he relieve the property of the prior incumbrance; he is not required to pay the costs of the foreclosure suit to which he was not a party. *Vroom v. Ditmas*, 4 Paige Ch. [N. Y.], 525; *Gage v. Brewster*, 31 N. Y., 218; *Moore v. Cord*, 14 Wis., 231; *Hosford v. Johnson*, 74 Ind., 479. The opposite conclusion appears to have been reached in *Stanbrough v. Daniels*, 77 Ia., 561, 42 N. W. Rep., 443. But we think that where, as here, the foreclosure proceeded with full knowledge of the rights of the junior mortgagee and with no attempt to make him a party, the latter ought to be in the same position in which he would have been if no decree had been rendered; in which case on making redemption he would have nothing to pay beyond the mortgage debt and interest. As to his rights, the decree in the cause to which he was not a party is of no effect.

With respect to the improvements, it is clear that they were made with full knowledge of appellee's outstanding right of redemption and with notice that she was asserting or about to assert such right. While a purchaser in good faith at foreclosure sale, who has made improvements upon the property in the belief that he acquired a good title, may claim compensation for such improvements on redemption by a junior mortgagee not barred by the foreclosure, one who buys with notice of the rights and claims of the junior mortgagee, and that his right to redeem has not been divested by the foreclosure, is not entitled to such compensation. *Cram v. Cotrell*, 48 Neb., 646. In such case, the proper course for the purchaser, if he desires the benefit of the improvements, is to pay off the subsequent mortgage. He had full notice thereof when he acquired the property, and knew that he held subject to an outstanding right of redemption. He can not be suffered to impose an additional burden upon the junior

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mortgagee without the latter's assent, where he acts with his eyes open.

We recommend that the decree be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

WALTER W. HACKNEY, AS TRUSTEE IN BANKRUPTCY OF THE
ESTATE OF JULIUS M. ERLBORN, V. HARGREAVES
BROTHERS.*

FILED NOVEMBER 19, 1902. No. 12,256.

Commissioner's opinion. Department No. 1.

Fraudulent Conveyances: PREFERENCES: INSOLVENCY. Where defendants admit that an assignment of their account against a bankrupt to a purchaser of his stock and business was with the understanding that it was to be used in payment therefor, and that they were to "carry" the purchaser on the account, if it be added that the defendants had notice of the bankrupt's insolvency, the transaction would amount to a preference and must be held to have been so intended.

ERROR from the district court for Lancaster county.
Tried below before HOLMES, J. *Reversed.*

John S. Bishop and Mockett & Polk, for plaintiff in error.

Tibbets Bros., Morey & Anderson, contra.

HASTINGS, C.

This is an action under the bankruptcy law to recover money alleged to have been paid to defendants as a preference. The real question seems to be whether or not the evidence adduced at the hearing, supposing that defendants knew their debtor to be insolvent, is such as to compel the conclusion that the parties intended the preference, which was the consequence of their acts. Plaintiff claims

* Rehearing allowed. See note *post*, page 901.

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that the transaction between the defendants, Hargreaves Bros., their debtor, Erlenborn, and the purchaser of the stock, Kettering, was such as inevitably to give the defendants reasonable cause to believe that a preference of their claim against Erlenborn was thereby intended to be given. The court left this question to the jury by instructions which seem fairly to represent the bankruptcy act. The case has been stated here as one of construction of the latter law. This does not seem to be true except as it is applied to the evidence. Counsel make their strong claim of error on the part of the trial court in the giving of the following instruction:

"The provision of the bankruptcy act, under which this action is prosecuted, does not mean that the said defendants would not have the right to sell their account against the said Erlenborn, and transfer the same to any person, for a consideration, but, on the contrary, this they would have a right to do whether they had knowledge of the debtor's insolvency or not, but it simply means that they would not have the right to evade the provisions of the bankruptcy act by any arrangement intended, or designed, to procure a preferment of their claim over that of other creditors, and so in this case, if the defendants, in good faith and with no intention, or design, to procure a preferment of their account against Erlenborn, transferred their account to Kettering for valid consideration, in the ordinary course of business, and not contingent upon any arrangement that Kettering contemplated with Erlenborn, then and in that event the defendants would not be liable in this action, notwithstanding the fact you may believe from the evidence and the rule as given you by the court herein, that the defendants had knowledge of the said Erlenborn's insolvency."

As above stated, the question with regard to this instruction seems to be its applicability to the evidence; the defendants admit in their testimony that they supposed and expected that the account would be used by Kettering in obtaining the business as successor to Erlenborn, and that

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they arranged to carry it for Kettering for some months. The proof shows that they did so carry it. It must be concluded then that the purpose for which the account was transferred was that it might be used in the purchase of Erlernborn's stock and business. The defendants, Hargreaves Bros., in view of all the circumstances disclosed in this case, certainly knew that Erlernborn was selling his entire business; if they also knew that he was insolvent, and they were certainly arranging to get their pay out of him, they must have known that the result of the transaction would be a preference as to them. This instruction gives an accurate statement of the law where the circumstances in proof are such as render it possible for the trial court to find that the transaction was merely a *bona fide* sale of an account without any intention to give or receive a preference. In this case, however, if the insolvency of the debtor was known to the defendants, with the fact that he was transferring all of his property, and defendants were arranging for payment out of it, there is no escape from the conclusion that a preference was intended because it would inevitably result. That being the manifest result, it should be held to have been intended. Lowell, Bankruptcy, section 79. "Cause to believe insolvency proves cause to believe the intent to prefer." Lowell, Bankruptcy, section 99.

We are of the opinion that this instruction was not applicable to the evidence, because it seems plain that if, to the facts admitted by the defendant's own testimony, there be added the supposition inserted in this instruction that they had knowledge of the insolvency, then they could not complete the transaction without subjecting themselves to the liability of having it avoided under the bankrupt law; if they knew he was insolvent, they must have known that a preference would result and must be held to have understood and intended it.

In the next following instruction the trial court indicates that such is the result of our view of the evidence, because it told the jury that if they found defendants

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transferred the Erlenborn account to Kettering out of the ordinary course of business and contingent upon Kettering's arrangement to purchase the Erlenborn stock, then it would be necessary to determine whether defendants had reasonable cause to believe that Erlenborn was insolvent, and that the transaction would result in a preference of defendants' claims and that it would be sufficient if they so found. As above stated, we think there can be no doubt that the defendants were parties to the transfer of the stock and that the arrangement by which they got 75 per cent. of their claim against Erlenborn was part of such transaction, and they themselves admit that the account was assigned with the understanding that it was to be used in payment for the goods. In other words, we think that under the evidence the trial court should not have left to the jury the question of whether or not the transaction between Kettering, Erlenborn and Hargreaves Bros. was an arrangement for the payment of the latter's claim and not a mere *bona fide* sale of account.

The question of the extent of defendants' knowledge of Erlenborn's liabilities seems to be an open one. The only attempt to close it is the affidavit of counsel for plaintiff as to what passed between himself and defendant's counsel in the course of argument. It is impossible to hold upon this record that the defendants are in any manner concluded by such remarks of counsel, whose precise wording and application the trial court made no attempt to determine.

It is recommended that for error in submitting to the jury the question as to whether or not there was a mutual arrangement between defendants Kettering and Erlenborn, for the settlement of this account, that this case be reversed and remanded for further proceedings according to law.

KIRKPATRICK, C., concurs.

REVERSED AND REMANDED.

IOWA LOAN AND TRUST COMPANY, APPELLEE, v. HERMAN
NEHLER, APPELLANT, ET AL.

FILED NOVEMBER 19, 1902. No. 12,271.

Commissioner's opinion. Department No. 2.

Mortgages: FORECLOSURE: DECREE REGULAR. Decree of confirmation
of sale examined and found regular.APPEAL from the district court for Sherman county.
Tried below before SULLIVAN, J. *Affirmed.**R. J. Nightingale*, for appellant.*E. J. Clements*, contra.

OLDHAM, C.

This is an appeal from an order of confirmation of sale in a foreclosure proceeding. The first objection urged against the decree is that the appraisement of the property was too low and was made by mistake of the appraisers in attempting to appraise the property at what it would bring at forced sale and not at its real cash value. An affidavit of the defendant was filed in support of this objection before sale, in which he claims that he was present when the appraisement was made and in his opinion the appraisers considered the property at what it would bring at forced sale instead of its real cash value. There is no merit in this contention as no fraud is alleged or attempted to be proven.

The next contention is one that is aged, time-worn and always overruled by this court, and that is that the sale was not made under an order of sale, but under the decree without a copy of the decree having been delivered to the sheriff.

The next contention is that the sale was made at the south door of the court house building, when it should have been made at the door of the room in which court is

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held in the court house, and the further objection is made that there is no south door to the room in which court is held and that the court is held in the second story of the court house building, and that it is entered by an east and not by a south door. This objection is hypercritical in the extreme and in conflict with the plain language of the statute as well as with frequent adjudications of this court.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

FRIEDERICKE LAU V. LLEWELLYN L. LINDSEY.

FILED NOVEMBER 19, 1902. No. 12,299.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: NEW TRIAL, MOTION FOR: FAILURE TO FILE.** In order to review the proceedings of the district court in a trial of issues of fact, by a petition in error, a motion for a new trial must be filed therein so as to afford the court an opportunity to correct error in its own proceedings.
2. **Appeal and Error: NEW TRIAL, MOTION FOR: FAILURE TO FILE: PLEADING.** Where no motion for a new trial is filed and the case is brought to this court by a petition in error, the judgment of the lower court will be affirmed if sustained by the pleadings.

ERROR from the district court for Lancaster county
Tried below before CORNISH, J. *Affirmed.*

Willard E. Stewart, for plaintiff in error.

D. G. Courtney, contra.

BARNES, C.

This action was commenced in the county court of Lancaster county, and was a proceeding by petition, motion and affidavit to revive a judgment that had theretofore been rendered in said court and had become dormant. An answer was filed setting forth a defense to the petition

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for a revivor, issues were made up and the cause tried. Judgment was rendered dismissing the proceeding, and the plaintiff prosecuted error to the district court of said county. While the matter was pending in that court new pleadings were filed, and the issues were again properly made up, after which the parties entered into the following stipulation:

"Hans P. Lau and Friedericke Lau }
v. } Stipulation of Facts.
Llewellyn L. Lindsey.

"It is hereby stipulated and agreed that in addition to the testimony, as preserved by the bill of exceptions in the above entitled proceeding, that the envelope referred to at page 18 thereof attached hereunto and marked exhibit '1,' should have been, and is made a part thereof. It is further agreed that no appeal was prosecuted from the disallowance of the claim of W. S. Allen against the estate of Hans P. Lau, and that the time therefor expired May 8, 1898; that receipts for claims referred to in 'order approving report' at page 28 of said bill of exceptions, were filed in said court, on the 10th day of January, 1899, whereby the same became final; that except as herein stated, said bill of exceptions contains all of the evidence admitted or offered in evidence on the hearing of said cause in said county court. It is hereby agreed between the parties to the above entitled proceeding for revivor of judgment, that said proceeding be heard and tried *de novo* in the district court of said county upon the testimony and evidence contained in said bill of exceptions filed herewith, together with the agreed facts contained herein. It is further admitted that no other claim or claims against L. L. Lindsey were held by Hans P. Lau, or the Lau estate, except the judgment herein attempted to be revived. This stipulation took the place of former stipulation.

WILLARD E. STEWART,

"For Plaintiff in Error.

"D. G. COURTNEY,

"Attorney for Defendant in Error."

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This stipulation was filed, and thereupon the cause was tried *de novo*. Findings of fact were duly made by the court in favor of the defendant, and a judgment was rendered denying the order of revivor and dismissing the cause. No motion for a new trial was filed, or other proceeding had in the district court. Afterwards the plaintiff brought the case here by a petition in error.

It appears from the record that an issue of fact was made up by the pleadings in the district court; that defendant by his answer set up as a defense to the revivor of the judgment the fact that he had been adjudged a bankrupt by the district court of the United States for the district of Nebraska, under the provisions of the bankruptcy act of 1898; that the judgment sought to be revived had been filed and scheduled among the claims against him in said bankruptcy proceedings; that he had been discharged from any liability on said judgment by the proceedings and orders of said court therein. For reply to this answer it was alleged that no notice of said proceedings was given to the plaintiff, or to the persons owning and holding the judgment, while they were pending, and that they were not bound thereby. This allegation was denied, and upon these questions of fact, together with others, the cause was duly tried in the district court.

Plaintiff having failed to file a motion for a new trial in said court we cannot entertain this proceeding in error. It is the settled law of this state, that where there was a trial upon issues of fact in the district court and no motion for a new trial was made in said court the alleged errors occurring on the trial cannot be considered here. *Lichty v. Clark*, 10 Neb., 472; 6 N. W. Rep., 760; *Weber v. Kirkendall*, 44 Neb., 766; *Weitz v. Wolfe*, 28 Neb., 500; *Carlson v. Aultman & Co.*, 28 Neb., 672; *Gaughran v. Crosby*, 33 Neb., at page 34; *Cropsey v. Wiggenshorn*, 3 Neb., 108; *Hosford v. Stone*, 6 Neb., at page 380; *Cruts v. Wray*, 19 Neb., 581.

No question arises herein on the pleadings or the proceedings, and the only errors complained of are those c-

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curring upon the trial. It is contended, however, that the judgment and final order of the court is not sustained by sufficient evidence, and is contrary to law. A motion for a new trial not having been filed none of these alleged errors can be considered in this court. We will say, however, that we have examined the record and findings in this case and are unable to say upon an examination of the evidence that the court was clearly wrong in its findings, or in the judgment based thereon. The pleadings are sufficient to sustain the judgment and for these reasons we recommend that the judgment of the district court be affirmed.

POUND and OLDBAM, CC., concur.

AFFIRMED.

JOHN N. RITTER ET AL. V. FANNY PIATT MYERS.

FILED NOVEMBER 19, 1902. No. 12,310.

92 NW 638
Commissioner's opinion. Department No. 2.

Adverse Possession: TRESPASS: INTENT: EVIDENCE. Where a defendant claiming title to land by adverse possession entered originally without color of title or claim of right, and the acts relied on to show entry and occupation adverse to the owner are consistent with a mere intention to trespass from time to time until interfered with, his testimony that he intended to take possession and hold and occupy as owner, uncorroborated by acts necessarily indicating such intention, is not sufficient to require a finding in his favor.

ERROR from the district court for Douglas county.
Tried below before SLABAUGH, J. *Affirmed.*

George A. Magney, for plaintiffs in error.

Isaac E. Congdon, contra.

POUND, C.

But one question is raised, namely, whether the evidence is sufficient to sustain the verdict and judgment. The

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action was one in ejectment, and the defendant pleaded adverse possession. At the trial, it appeared that the property was wild, uninclosed timber land along the bluffs of the Missouri river, and that the defendant, who lived upon an adjacent tract, had made more or less use of parts of the land in controversy from time to time for many years, without any color of title or original claim of right. During the whole period the owner of the title had paid taxes upon the property, and defendant did not show that he had done anything necessarily inconsistent with a mere intention to trespass from time to time until interfered with. He testifies, however, that he intended to take possession of the tract and to hold and occupy it as owner. The instructions of the trial court are commendably clear, accurate, and concise, and no complaint is made of any of them in the briefs. Under these instructions, the jury found for the plaintiff, and we have only to consider whether defendant's statement as to his intention in connection with the other evidence requires a different finding. We had this precise question before us in *Knight v. Denman*, 64 Neb., 814, 90 N. W. Rep., 863, and after a somewhat elaborate review of the authorities held that where there was no color of title and the acts done did not necessarily indicate entry and occupation as owner, the mere testimony of the defendant as to his intention was not conclusive. The question is to be determined by the jury, under proper instructions, from all the evidence, and the weight to be given to defendant's statement, where the evidence as to his acts leaves their character doubtful or ambiguous is for the jury only. Where there is no color of title, many things which would be assertions of ownership, if done under a title, real or supposed, may be and may be intended to be mere trespasses. The burden was upon the defendant to show that he had held the land as owner, under a claim of ownership. *Colvin v. Republican Valley Land Association*, 23 Neb., 75. Upon this question the jury found against him on conflicting testimony, and we see no reason to doubt the correctness of their finding.

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We recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

NELS ANDERSON V. A. A. KANNO.

FILED NOVEMBER 19, 1902. No. 12,314.

Commissioner's opinion. Department No. 2.

Trial: BURDEN OF PROOF: INSTRUCTION WRONG AS TO. It is reversible error to give an instruction which places the burden of proof upon the wrong party.

ERROR from the district court for Cedar county. Tried below before GRAVES, J. *Reversed.*

J. C. Robinson, for plaintiff in error.

R. J. Millard and *C. H. Whitney*, contra.

OLDHAM, C.

Plaintiff in this cause of action was the owner of a flour mill called the "Paragon Mill," situated in Cedar county, Nebraska, which he leased to the defendant for the year 1896, taking twelve notes of \$75 each in payment of the rent. In 1897, he leased the same property to the defendant for \$750, one-half payable January 1, and the remainder July 1. All of the notes for the 1896 rent were paid except two. On these two notes plaintiff instituted suit in the county court of Cedar county against the defendant. Subsequently plaintiff brought another suit against the defendant, Kanno, in a justice court of Cedar county, for balance alleged to be due for the rent of the mill for the year 1897. Defendant appeared in each of these actions and filed answers in the nature of a counter-claim. Each of the actions were appealed to the district court of Cedar county, where they were consolidated by an agreement

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of the parties and new pleadings filed, and a trial was had. Later other attorneys were employed and the objection was raised that defendant's answer contained issues not plead in the court below. This objection was overruled, because it was interposed too late and not supported by the transcript of the proceedings in the case in the court below. The only thing we can determine from an examination of the transcript and supplemental transcript is that defendant in a very informal manner pleaded all the defenses and counter-claims in the court below that were interposed in the district court, as well as others which he appears to have attempted to abandon in the court below. We think that in this state of the record and in view of the fact that no objection was made on account of the change in the issues after a trial had been had that the rule of the learned district court on this question should not be disturbed. On the issues joined in the court below defendant recovered a judgment on his counter-claim, and plaintiff brings error to this court.

The first two counts of plaintiff's petition alleged on the two notes. Defendant's answer to these counts admitted the execution and delivery of these notes and pleaded payment. The third count of plaintiff's petition was on the alleged balance due for the rent of 1897. Defendant answered this count admitting the contract of lease and pleaded a counter-claim. Under the issues so formed the court on his own motion instructed the jury that the burden of proof was on plaintiff to establish each of the material allegations of his petition by a preponderance of the evidence, and the giving of this instruction is alleged as reversible error by counsel for plaintiff. Counsel for defendant admits that the instruction standing alone is wrong in view of the issues arising on the pleadings, but contends that the error, if any, was cured by a subsequent instruction given by the court at the request of plaintiff, which told the jury, in substance, that the burden of proof was on the defendant as to the payment of the notes alleged on in the first and second counts of plaintiff's petition.

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These two instructions were contradictory in their nature and may have confused the jury, because it appears from the bill of exceptions that the notes had been lost or mislaid after the trial of the case in the court below, and were not introduced in evidence at the trial in the district court. It is plain from an examination of the record that the matter in dispute between these parties arose from indefinite recollections of poorly kept accounts; consequently we are unable to say that the instruction given by the court on its own motion may not have misled the jury to plaintiff's injury.

We therefore recommend that the judgment of the district court be reversed and the cause remanded.

BARNES and POUND, CC., concur.

REVERSED AND REMANDED.

THE GERMAN MUTUAL FIRE INSURANCE COMPANY V.
WILLIAM E. PALMER.

FILED NOVEMBER 19, 1902. No. 12,316.

92 NW 62 ✓
Commissioner's opinion. Department No. 2.

Appeal and Error: ASSIGNMENT: NEW TRIAL, OVERRULING MOTION FOR. *Gandy v. Cummins*, 64 Neb., 312, 89 N. W. Rep., 777, and *Achenbach v. Pollock*, 64 Neb., 436, 90 N. W. Rep., 304, followed.

ERROR from the district court for Frontier county. Tried below before NORRIS, J. *Affirmed*.

F. P. Olmstead, for plaintiff in error.

J. L. White, *contra*.

POUND, C.

We were informed by counsel for defendant in error that upon reading the record we should find the plaintiff in error could not maintain this proceeding. Reference was

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made, doubtless, to the omission to assign the order overruling the motion for a new trial as error. The errors assigned are all such as are required to be raised in the district court by such a motion, and unless the action of that court upon the motion is assigned as error, we are not called upon to review them. *Gandy v. Cummins*, 64 Neb., 312, 89 N. W. Rep., 777; *Achenbach v. Pollock*, 64 Neb., 436, 90 N. W. Rep., 304.

It may be said, however, that plaintiff in error relies chiefly upon *German Insurance Co. v. Heiduk & Skibowski*, 30 Neb., 288, and *Northern Assurance Co. v. Grand View Building Association*, 183 U. S., 308, 22 Sup. Ct. Rep., 133, and contends that notice to the agent of an insurer that additional insurance is held does not affect the insurer unless the agent has power to waive the forfeiture, and that adjustment of a loss by an authorized adjuster will not operate as a waiver unless special authority to make the waiver is established. But *German Insurance Co. v. Heiduk & Skibowski* has been modified considerably by more recent decisions. *Hunt v. State Insurance Co. of Des Moines*, 66 Neb., 121, 92 N. W. Rep., 921; *Hartford Fire Insurance Co. v. Landfare*, 63 Neb., 559, 88 N. W. Rep., 779. And while we entertain the highest respect for the distinguished tribunal which decided *Northern Assurance Co. v. Grand View Building Association*, its adjudications upon general questions of law are not binding upon this court and do not require us to overturn a well settled and long established course of decisions therein. The other point is determined in *St. Paul Fire & Marine Insurance Co. v. Gotthelf*, 35 Neb., 351. If the facts were such as to entitle the insurer to insist upon a forfeiture if it chose, any act thereafter with knowledge or notice thereof inconsistent with reliance upon the forfeiture would be a waiver. *Hunt v. State Insurance Co. of Des Moines*, *supra*, and cases cited.

We recommend that the judgment be affirmed.

OLDHAM, C., concurs.

AFFIRMED.

School District v. Kountze Bros.

SCHOOL DISTRICT NO. 34, ADAMS COUNTY, NEBRASKA, v.
KOUNTZE BROTHERS.

FILED NOVEMBER 19, 1902. No. 12,889.

Commissioner's opinion. Department No. 1.

1. **Judgment: PARTIES, JOINT: OMISSION OF ONE: VALIDITY.** A judgment against one of two parties jointly liable is not void for not including the other. At most it would only be voidable.
2. **Limitation of Actions: REVIVOR: ACTIONS DISTINGUISHED FROM JUDGMENTS.** The limitation of one year for revivor of actions does not apply to proceedings to revive a dormant judgment.
3. **Judgment: PARTIES: REVIVOR AS TO: JURISDICTION.** Where a judgment in form runs against two parties but there was no jurisdiction of one of them, and the latter was not in fact a party to the action, or to the judgment, revivor proceedings need run and are maintainable against only the party as to whom there was jurisdiction.
4. **Judgment: REVIVOR BY ASSIGNEE.** An assignee of a judgment may maintain revivor proceedings upon it in his own name.

ERROR from the district court for Adams county. Tried below before ADAMS, J. *Affirmed.*

W. P. McCreary and W. F. Button, for plaintiff in error.

John M. Ragan and Reavis & Reavis, contra.

HASTINGS, C.

In this case the school district complains because the district court sustained a motion to revive a judgment. The application for revivor set forth that Kountze Bros., a corporation, were the owners of the judgment which was rendered June 26, 1878, in the district court for Adams county, in favor of Herman Kountze and Augustus Kountze, copartners, against school district No. 34 of Adams county; that no execution had been issued; that it bore ten per cent. interest and asked that it be revived in favor of Kountze Bros., a corporation. A showing was attached setting forth a series of payments, the first June

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27, 1881, and the last May 17, 1899, aggregating nearly \$2,000; a conditional order was entered requiring the school district to show cause by November 7, 1901, why the judgment should not be revived in favor of Kountze Bros., a corporation, and on November 6, 1901, the school district filed an answer admitting the corporation to be the successor of Herman and Augustus Kountze and owner of the judgment, but denying the corporation's right to maintain this proceeding for revivor because the original judgment had never been revived in its name. The answer further set forth that the judgment was based on two bonds for \$500 each; that school district No. 34 of Adams county, by permission of the superintendent of public instruction of that county, joined with school district No. 21 of Hall county, under similar permission, for school purposes; that the bonds were issued by the two districts but in the name of district No. 34 alone; that the judgment was pronounced against both school districts and their territory but no summons was ever issued against school district No. 21, nor did it appear in the action; that the judgment was a general judgment against both the school districts and could not be revived against district No. 34 alone, and that it had been dormant for eighteen years, to wit: since 1883, and that the proceedings were barred by the statute of limitations. A reply to this showing was filed denying all its allegations except that the judgment was rendered upon two bonds for \$500 each. The reply further alleged that in certain mandamus proceedings, the officers of Adams county and of school district No. 34 had claimed that the judgment was totally void and also claimed that it was irrevocably dormant; that said action of mandamus, after its determination by the district court of Adams county, had been appealed to this court, and that this court had held that there was no judgment against school district No. 21 in Hall county, and that the judgment against district No. 34 of Adams county had become dormant; that the original judgment had been rendered June 26, 1878, against school district No. 34 of Adams county for \$1,-

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258.98 and \$18.83 costs; that there was still due on the judgment \$2,012.10 and interest at ten per cent. from November 11, 1901; that the judgment was the property of Kountze Bros., copartners, and the corporation was entitled to have it revived in the corporate name. The trial court found generally for the applicant and ordered the judgment revived in the name of Kountze Bros., a corporation. The defendant renews in this court its objections.

Evidently the judgment would not be void merely because taken against one of two parties who were jointly liable; the omission of the other party might be an error but would not deprive the court of jurisdiction as regards the one. It is true that this court, in *Alter v. State*, 62 Neb., 239, 86 N. W. Rep., 1080, determined that there was no judgment against school district No. 21 of Hall county, but it also found that there was jurisdiction in the original action over school district No. 34 of Adams county, and a judgment entered against that school district. Objections going back of the original judgment other than as to jurisdiction will not be considered on an application to revive. *Wright v. Sweet*, 10 Neb., 190. The objection that the judgment was void seems therefore not well taken.

The contention that revivor was totally barred by the statute of limitations has been many times overruled by this court, and expressly in *Bankers Life Ins. Company v. Robbins*, 59 Neb., 170. A presumption of payment arises with lapse of time but is available to defendant only on plea of payment. *Garrison v. Aultman*, 20 Neb., 311. In this case it is stipulated that the judgment is unpaid.

It only remains to consider the point urged by the defendant, that this proceeding could not properly be taken in the name of Kountze Bros., a corporation, without the judgment having been first revived in its name; in other words, counsel for the school district say that there must be two revivors, a revivor first in the name of Kountze Bros., a corporation, who are now the owners, second, another revivor after that had been done to do away with

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the dormancy of the judgment. This contention seems to be based upon the proposition that an assignee of a judgment cannot in his own name bring proceedings for revivor; that it is only new actions which can be brought in the name of the assignee. It is true that it is nowhere, in terms, alleged or proved that the corporation is the assignee of the former partnership. It is, however, expressly admitted that the corporation is the owner of the judgment. It certainly could become so only by some manner of assignment from the partnership. Mr. Freeman, in his work on Judgments [4th ed.], section 443, says: "If no change has taken place in the parties plaintiff, a *scire facias* to revive a judgment must be prosecuted in the name of all of them; and though the judgment has been assigned, the writ must be in the name of the original plaintiff, unless some statute permits the assignee to proceed in his own name." 1 Black, Judgments, section 488, cited by the trial court in passing on this motion, is even more explicit, as is also 18 Ency. Pl. and Pr., page 1066. Section 29 of the Civil Code provides that every action must be prosecuted in the name of the real party in interest, except as otherwise provided. As actions may be prosecuted, as well as begun, in the name of the real party in interest, it seems entirely immaterial whether this proceeding is a new action or a continuance of the other. It would seem that the proper party to bring it is the corporate person now owning the judgment. *Wright v. Parks*, 10 Ia., 342; *Welsh v. Childs*, 17 Ohio St., 319. Probably this provision of our statute would be held permissive as in *McRoberts v. Lyon*, 79 Mich., 25, 44 N. W. Rep., 160, but we see no error in applying it here.

It is recommended that the order of revivor entered by the district court be affirmed.

KIRKPATRICK, C., concurs.

AFFIRMED.

Beer v. Dalton.

BERNARD BEER ET AL. v. PATRICK H. DALTON, SUBSTITUTED
FOR JOSEPH P. EGAN.

FILED DECEMBER 3, 1902. No. 11,880.

Commissioner's opinion. Department No. 1.

1. **Adverse Possession: OCCUPANCY UNDER EXECUTORY CONTRACT.** The possession of land under an executory contract of purchase is not adverse to the vendor until the purchase price is paid, or until the vendee is entitled to a deed of conveyance from his vendor under the terms of the contract.
2. **Adverse Possession: OCCUPANCY: REQUISITES: LIMITATION OF ACTIONS.** One who claims title to land by adverse possession must show that his occupancy has for a period of ten years been open, notorious, exclusive and adverse, and under claim of title as against the true owner and the world.
3. **Appeal and Error: VERDICT ONLY ONE POSSIBLE: INSTRUCTIONS: PREJUDICE.** Where the verdict returned is the only one which under the pleadings and proof could have been allowed to stand, errors in the giving of instructions are without prejudice.
4. **Adverse Possession: LIMITATION OF ACTIONS: EVIDENCE SUFFICIENT.** Evidence examined, and found to sustain the finding and judgment of the trial court.

ERROR from the district court for Lincoln county. Tried below before SULLIVAN, J. *Affirmed.*

Thomas C. Patterson, for plaintiffs in error.

Wilcox & Halligan, contra.

KIRKPATRICK, C.

This is an action in ejectment brought in the district court for Lincoln county by Joseph P. Egan against Bernard Beer, Mary T. Patterson and others to recover the possession of section 17, township 13 north of range 31 west, in Lincoln county. The petition is in the usual form in ejectment proceedings, claiming title to the land and asking judgment for rents and profits. Answers were filed by Mary T. Patterson and Bernard Beer, August Feiler and Oliver Crissey, pleading ownership in them-

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selves of certain portions of the land described in the petition, and denying that plaintiff Egan had any title to or interest in the premises, claiming title in themselves by adverse possession, and pleading that the cause of action mentioned in Egan's petition did not accrue within ten years next before the commencement of the action. To these answers a reply was filed by Joseph P. Egan, consisting of a general denial. Prior to the trial of the cause in the district court Patrick H. Dalton, who had purchased the land in controversy from Joseph P. Egan, was substituted as plaintiff. Trial was had, which resulted in a verdict and judgment for defendant in error Patrick H. Dalton, from which judgment Bernard Beer, Mary T. Patterson, August Feiler and Oliver Crissey prosecuted error to this court.

The facts in the case, as disclosed by the record, briefly stated, are as follows: On the 21st day of March, 1883, plaintiff in error Beer, entered into an agreement, in the nature of an application to purchase, with the local agent of the Union Pacific Railroad Company at North Platte for the purchase of the land in controversy, and paid to such local agent one-fifth of the purchase price, and was given a receipt by the agent which stated upon its face that the sale and purchase was subject to the approval of the land commissioner of the Union Pacific Railroad Company, and that the purchase was on five years' time. The land commissioner declined to approve the sale, and the company refused to consummate it, and tendered back to Beer the money paid by him on the purchase price. He refused to accept the tender, and some time thereafter entered into possession of the land, and by himself and tenants enclosed it with a wire fence. He seems to have made a tender of part of the purchase price, which he claimed to be due, and each year thereafter, and finally on the 21st day of March, either in 1887 or 1888, he made a final tender of the money remaining due on the purchase price of the land. All these tenders were refused by the railroad company, and the amount of the first payment

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previously received by the company was tendered back to Beer, and on his refusal to accept it, was deposited, subject to his order, in a bank at North Platte, of which action he was notified. On August 13, 1884, the Union Pacific Railroad Company sold the land in controversy upon a ten-year contract to Michael J. Egan. On the 11th day of September, 1885, Egan, being desirous of using the land in controversy in connection with a ranch which he was operating near there, entered into some kind of an agreement with Beer, as a result of which he accepted a written lease from Beer for one year from September 11, 1885, for which he agreed to pay the sum of forty dollars. Egan then went into possession. He afterwards assigned his contracts of purchase to his wife, who, in 1891, rented the land to one Murray, who went into possession of the land occupied the same from August, 1891, to April, 1894, at which time he surrendered possession of the premises to plaintiff in error Beer. In the meantime M. J. Egan and wife had sold all their interest in the contract for the section of land to Joseph P. Egan, who afterwards sold to Patrick H. Dalton, who was substituted as plaintiff below.

It is claimed by plaintiffs in error that Beer and his grantees were in possession of the premises for ten years, and that he thereby obtained title. In order to piece out the full ten years, it is claimed that Egan went into possession as the tenant of Beer, and that he is estopped from setting up title as against Beer; that Egan, his wife, who purchased from him, Murray, her tenant, and Joseph P. Egan and Patrick H. Dalton, who finally became purchasers of the premises, are all in privity with Michael J. Egan, and that the possession of themselves and tenant was the possession of Beer; and from these facts it is claimed that Beer was in the open, notorious, exclusive, adverse possession of the premises for more than ten years, by reason of which he acquired title. In 1895 Beer accepted the tender made by the railroad company of the \$500. first payment, and received back that sum of money. Plaintiffs in error do not claim under any contract with

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the Union Pacific Railroad Company, but base their claim of title entirely upon adverse possession and the statute of limitations. It is not claimed that Beer ever paid anything for the premises. On the other hand, the undisputed testimony shows that defendant in error Patrick H. Dalton is the owner of the legal title, which he obtained by a perfect chain of title extending from the United States government through the Union Pacific Railroad Company to his grantor.

Several questions are presented in the record and argument in briefs, not all of which will require consideration. From the undisputed evidence, it is disclosed that plaintiff in error Beer, at least up to the time he made his last tender of payment in 1887 or 1888, was claiming under his contract with the railroad company, and his possession of the land during that period was by virtue of his contract. Such occupancy was not with intent to claim adversely to the title of the true owner, the railroad company, and his occupancy was, therefore, not adverse to it. It is necessary to show that such occupancy was with intent to claim adversely to the title of the true owner before title by adverse possession can be built up. Only occupancy of a character hostile to the true owner can ripen into a title. *Cervena v. Thurston*, 59 Neb., 343; *Omaha & R. V. R. Co. v. Rickards*, 38 Neb., 847. The rule seems to be settled that the possession of one who occupies premises under an executory contract of purchase is not in possession adverse to the vendor so long as the purchase money is not paid, or until, by the terms of the agreement, the vendee is entitled to demand a conveyance of the legal title. *Farish v. Coon*, 40 Cal., at page 54; *Kerns v. Dean*, 77 Cal., 555; *Timmons v. Kidwell*, 138 Ill., 13; *Woods v. Dille*, 11 Ohio, 455; *Anderson v. McCormick*, 18 Ore., 301; *Furlong v. Garrett*, 44 Wis., at page 122; *Lovell v. Frost*, 44 Cal., at page 474. It is therefore clear that in the case at bar the possession of plaintiff in error Beer did not become adverse as to the Union Pacific Railroad Company or its privies until after he was entitled to a deed of the premises on account of his

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having paid or tendered the full amount of the agreed purchase price. If the tender of the final payment was made March 21, 1887, then more than ten years had elapsed before the commencement of the action; and if Beer's possession during that time had been such as the law requires, it might have ripened into a perfect title. If, however, the tender of final payment was on March 21, 1888, then the ten years had not elapsed at the commencement of this action, and the plea of the statute of limitations interposed by plaintiffs in error would have been unavailing in any event.

Plaintiff in error Beer testified in answer to questions as follows:

Q. What did you do on March 21, 1885, with reference to making them a tender under the contract?

A. I think I made them a tender of the money.

Q. What did you do on March 21, 1886, with reference to making them a tender under the contract?

A. I think I made them a tender of the money.

Q. You made them a tender every year until the last year, which was March 21, 1888, when you made them a final tender of everything that was due?

A. Yes, sir.

The receipt which Beer took from the local agent of the railroad company at the time he claims to have purchased the land, recited that the land was sold upon five years' time, which period would not expire until March 21, 1888. It is true that counsel for plaintiffs in error testified that he was acting for Beer in the matter of making the tenders to the railroad company, and that the last tender was in fact made March 21, 1887; that he had calculated that inasmuch as one-fifth of the purchase price was paid down, payments in like amounts would pay the contract out in four years instead of five. Here was a conflict in the testimony, to decide which was for the jury. The jury must have found that Beer did not make a tender of final payment and demand a deed for the premises until March 21, 1888, and we are unable to say that this finding is not

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supported by sufficient evidence. Other questions are presented by the record from which it is apparent that the verdict of the jury is right, but they need not be considered.

Plaintiffs in error pleaded adverse possession and the statute of limitations, and relied wholly thereon, and the testimony having failed to establish the allegations of their answer, the judgment and finding of the trial court are right. It is clear that under the pleadings and the evidence, no other verdict could have been returned, and it follows that the alleged errors of the trial court in the giving of certain instructions could not have been prejudicial to plaintiffs in error. The judgment of the trial court is right, and it is therefore recommended that the same be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

THE CITY OF SOUTH OMAHA V. ANNIE MEYERS.

FILED DECEMBER 3, 1902. No. 12,166.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: PREJUDICE.** A judgment will not be reversed for errors which could not possibly have prejudiced the rights of the party complaining.
2. **Appeal and Error: PREJUDICE: EVIDENCE.** Certain testimony admitted over objections examined, and *held* not to have prejudiced the party complaining.
3. **Trial: INSTRUCTIONS OF COURT INACCURATE: TENDER OF CORRECT ONE: WAIVER.** Where the trial court undertakes to instruct the jury as to the issues involved in a cause on trial before them, he should state the issues fully, accurately and fairly; but where such instruction is incomplete, vague or uncertain, counsel should tender an instruction free from the defect urged and obtain a ruling thereon, in order to lay the basis for complaint upon review; otherwise the error, if any, will be deemed to have been waived.
4. **Appeal and Error: INSTRUCTIONS CONSTRUED TOGETHER.** Instruc-

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tions should be read and construed together, and if, upon the whole, they fairly and correctly state the law applicable to the issues joined, they will be upheld.

5. **Appeal and Error: EVIDENCE SUFFICIENT: VERDICT CONCLUSIVE.** The verdict of a jury is uniformly held conclusive upon a disputed question of fact properly submitted, if it is sustained by sufficient competent testimony.
6. **Municipal Corporations: PERSONAL INJURIES: INSTRUCTION AS TO DEGREE OF CARE.** Plaintiff, while attempting to go from the paved portion of the street to the sidewalk was injured by reason of the defective condition of an intervening meter box. The place of injury was in front of a hotel in a much traveled portion of the city. The adjacent sidewalk was defective, by reason of which travel had been deflected, causing pedestrians to walk near the meter box. *Held*, That the trial court's refusal to instruct the jury that plaintiff was required to exercise a higher degree of care in passing from the paved street to the sidewalk than would be required upon either the street or sidewalk, was not error.

ERROR from the district court for Douglas county.
Tried below before KEYSOR, J. *Affirmed*.

W. C. Lambert, for plaintiff in error.

E. T. Farnsworth, *contra*.

KIRKPATRICK, C.

This proceeding is one in error brought by the city of South Omaha to reverse a judgment obtained by Annie Meyers recovered in the district court for Douglas county in the sum of \$2,000 for personal injuries claimed to have been sustained on account of the negligence of the city. It is alleged that there is error in the proceedings of the trial court in this: (1) that the court erred in the admission of certain testimony offered by defendant in error; (2) that the verdict is not sustained by sufficient evidence; (3) that the court erred in giving instructions numbered 1 and 2 on its own motion; and (4) that the court erred in refusing to give instructions numbered 4 and 7 requested by plaintiff in error.

The first complaint of error arises on account of the admission of the testimony of one George Schmidt, who

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was permitted to testify to the bad condition of a certain meter box placed in the street by the water-works company by permission of the city. His testimony related to the condition of the box some two years prior to the injury sustained by defendant in error caused by the rotten and unsafe condition of the boards constituting the meter box. It is alleged by plaintiff in error that the condition of the meter box two years before the injury alleged was too remote and that there was no testimony tending to show that its condition remained the same up to the time of the injury. The witness, after having testified on direct examination, that the meter box was a "poor outfit" and was in a bad condition, on cross-examination, in answer to questions propounded by counsel for plaintiff in error, testified as follows:

Q. The box when you saw it in 1896, and the boards of the box seemed sound and solid, except the dirt was washed away?

A. The box was in a bad fix already.

Q. Were the boards solid?

A. No. I had to nail them down once in a while.

Q. They were not rotten?

A. Yes, sir. They were rotten.

Q. Did you replace them?

A. No. I had the police do it—the water man.

Q. They did it?

A. Yes, sir.

Q. Then they replaced it, and made it solid from new boards in 1896?

A. All new boards. They fixed it out a little bit.

Q. So it was all right?

A. Yes, sir.

It is readily apparent that this testimony was very favorable to the contention of the city, and tended to show that the meter box had been put in a good state of repair some two years before the injury complained of, and it is very clear that this testimony was not prejudicial to plaintiff in error.

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It is next contended that the verdict is not sustained by sufficient testimony in this: that the testimony was insufficient to show that the city had actual notice of the defective condition of the meter box, or that the condition had existed long enough so that the city would be presumed to know of its condition. In this regard there is a sharp conflict in the evidence. One Martin Anderson was called by defendant in error, and testified that during the month of July, the month immediately preceding the time of the injury, he was one of the police officers of the city of South Omaha, and that the street whereon the injury occurred was on his beat; that at one time in crossing to the meter box, the top of it tipped up and came very near throwing him into the box; that he examined the box and found the lumber decayed and the meter box in bad condition; that he thereupon notified one John Ross, who was street commissioner of South Omaha, of the condition of the meter box, informing him that it was in bad condition and that it was dangerous to people traveling on the street, and should be repaired. Ross was called as a witness on behalf of the city, and being interrogated upon the point testified to by Anderson, said that he had no recollection of ever having had his attention directed to the meter box by Anderson, and after testifying at some length, finally positively denied that Anderson had ever mentioned the condition of the box to him, and further stated that he did not know of the condition of the box. From this it is apparent that the question whether the city had actual notice or not was one of disputed fact. It thereby became one for the jury's determination under proper instructions of the court. Their finding thereon, under the established rule of this court, must be held to be final.

It is next contended that the court erred in giving instruction No. 1 upon its own motion. It is insisted that in this instruction the court undertook and assumed to enumerate all of the issues presented by the pleadings as well as to state the law of the case, and that two controverted issues were by the court in this instruction wholly

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omitted. The instruction complained of, after reciting the substance of the pleadings filed, proceeded as follows: "The court instructs you that as a matter of the law the notice which the undisputed evidence in this case shows was filed in the proper office of the defendant city was sufficient notice of the accident complained of in this case as required by the statutes of this state. In order to recover in this action it will be necessary for the plaintiff to establish by a preponderance of the evidence, first, that she was injured at and on or about the place and time alleged in the petition; second, that her injuries were the direct result of the meter box, referred to in the evidence and the pleadings, being out of repair and in an unsafe condition for the uses of travelers in the public street; third, that the condition of said meter box was due to the negligence on the part of defendant city; fourth, what amount of damages, if any, she suffered by reason of her said injuries." It is contended that this instruction took away from the jury the issue of contributory negligence raised by the answer of the city, and also the question of notice to the city of the defective condition of the meter box. The instruction quoted seems in a measure at least vulnerable to the objections urged. But it does not necessarily follow that it is such error as will require the reversal of the case.

In the case of *The Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578, this court said: "It is the duty of the district court upon the trial of a cause to a jury, to inform the jury by its instructions of the issues in the case on trial. But if on such trial the issues in the case are imperfectly stated, the party desiring a more specific instruction, must call the attention of the court thereto by a request for a correct instruction in order to secure a review of such failure by the supreme court." To the same effect are *Burlington & M. R. Co. v. Schluntz*, 14 Neb., 425; *Sioux City, etc., R. Co. v. Brown*, 13 Neb., 317. Plaintiff in error did not present, and request to have given, an instruction which did correctly and more fully set forth

the issues, but in lieu thereof presented an instruction upon the question of contributory negligence and one upon the question of notice, which will be hereinafter adverted to. Following instruction No. 1 the court on its own motion gave instructions Nos. 3 and 4, which are as follows:

"3. The defendant city is liable only for such unsafe conditions of its streets as it had actual notice of, or ought to have known of by exercising what would be under all the circumstances ordinary and reasonable caution and diligence. If, therefore, the preponderance of the evidence fails to show that the defendant knew or ought to have known of the unsafe condition of said box, if you find it was unsafe, then your verdict should be for the defendant.

"4. If you believe from a preponderance of the evidence that the meter box referred to in the testimony was rotten and out of repair, and that it was by reason of such condition an unsafe and dangerous place in said street, and rendered it dangerous to use the street and sidewalk immediately adjacent thereto, and if you further find that plaintiff, without fault on her part, fell into said meter box, then you should return a verdict for her provided you further find that the defendant city knew, or, by the exercise of ordinary care, ought to have known of said condition of said box long enough before said accident to have put it in good repair."

These instructions seem correctly to state the law. They certainly are as favorable to the city as plaintiff in error could ask, and are more favorable to the city than the instruction upon the same question which was tendered by counsel for the city and refused by the court, refusal of which is assigned as error. We are of opinion that under these instructions the jury could not have been misled because of the omission from instruction No. 1, of the issue regarding notice to the city either actual or constructive. By these instructions, the jury were told that they must find for the city unless actual or constructive notice to the city was shown.

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Upon the issue of contributory negligence, the court, upon its own motion, instructed the jury as follows:

"Instruction No. 5. It is incumbent upon the people who are crossing the streets and sidewalks of South Omaha to use ordinary care to protect themselves from injury and accident liable to occur because of streets or sidewalks being unsafe for public use, and if they fail to do so, they will be guilty of contributory negligence which will prevent a recovery of damages. If you find from a preponderance of the evidence that plaintiff did not exercise ordinary and reasonable care in stepping on said meter box or the ground next to it, as you may find the fact to be, then your verdict must be for the defendant, even though you further find that the defendant was negligent."

This instruction seems fairly to present to the jury the issue of contributory negligence raised by the answer of the city, and we are of opinion that the omission from instruction No. 1 of the issue of contributory negligence, if error, was cured, so that when all instructions are construed together it appears that plaintiff in error was not prejudiced.

By the seventh instruction requested by plaintiff in error, the court was asked to instruct the jury that the plaintiff was not justified in presuming that that portion of the public street lying between the paved portion of the street and the sidewalk was in a reasonably safe condition for public travel, and that plaintiff was, therefore, required to exercise a higher degree of care and caution to protect herself from injury while crossing over such space in the street than she would be required to exercise in the use of the usually traveled parts of the street. Several authorities are presented which it is claimed support this theory. We have examined them, and find that they have no application to facts such as shown herein. This was a portion of the street immediately in front of a hotel in the business portion of the city, and the testimony shows that on account of the sidewalk being out of repair, much of the public travel passed over that portion of the

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street between the paved street and the sidewalk. We are of opinion that the instruction requested does not correctly reflect the law applicable to such a state of facts, and as the law was rightly stated in other instructions, the refusal of the court to give instruction No. 7, as requested, can not be held to be error.

After a careful examination of the questions presented by counsel under this record, we are unable to discover error prejudicial to the rights of plaintiff in error, and it is therefore recommended that the judgment of the trial court be affirmed.

HASTINGS C., concurs.

AFFIRMED.

ESTATE OF ANNA WATTERS, DECEASED, AND A. R. WATTERS,
ADMINISTRATOR, V. EDWARD S. BAGLEY.

FILED DECEMBER 3, 1902. No. 12,188.

Commissioner's opinion. Department No. 3.

Covenants: INCUMBRANCES, AGAINST: RUNNING WITH LAND. A Covenant in a deed of conveyance "that they are free from all incumbrances" does not run with the land so as to invest a remote grantee thereof with a right of action against the covenantor.

ERROR from the district court for Knox county. Tried below before CONES, J. *Reversed with directions.*

W. D. Funk and W. R. Ellis, for plaintiffs in error.

Charles Kamanski, contra.

DUFFIE, C.

December 17, 1898, Anna Watters and husband conveyed certain real estate in Knox county to Mattie A. Coleman, which deed contained the following covenants: "And we do hereby covenant with the said Mattie A. Coleman and her heirs and assigns that we are lawfully seized of said premises; that they are free from all incumbrance;

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that we have good, right and lawful authority to sell the same, and we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever."

April 3, 1900, Mattie A. Coleman conveyed the premises by warranty deed to the defendant in error, E. S. Bagley, who was the owner of the same at the time this action was instituted. At the time Mrs. Watters conveyed the land to Mrs. Coleman there were unpaid taxes amounting to \$145.50 due against the land and which was a lien thereon. Bagley has paid these taxes and made a claim therefor against the estate of Mrs. Watters, who had died subsequent to her conveyance. The county court refused to allow the claim, and on appeal to the district court judgment went in favor of Bagley, from which judgment the administrator has taken error to this court.

There is but one question in the case: Does a covenant against incumbrances in the form above recited, pass with the land so that an action may be maintained thereon by Bagley?

Rawle, in his work on Covenants for Title [4th ed.], chapter 5, page 89, says: "Nothing is better settled, both in England and America, than that the covenant for quiet enjoyment (which is, that the grantee shall peaceably enjoy the premises) is eminently a covenant *in futuro*; until breach, it runs with the land; it is not broken by the mere existence of an incumbrance or defect of title; its breach depends upon the disturbance or damage which that incumbrance or defect may thereafter cause. On the other hand, it is settled by a large class of cases on this side of the Atlantic that the covenant against incumbrances, as here generally expressed, standing by itself as a separate and independent covenant, and generally couched in the short form, 'and that the premises are free and clear of all incumbrance,' is a covenant *in presenti*; it is broken as soon as made by the mere existence of an incumbrance, without regard to future or ultimate disturbance or damage; and, being so, it does not run with the land. When, however,

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the covenant against incumbrances, instead of thus standing by itself, is linked or coupled to the covenant for quiet enjoyment, as is almost always the case in England and sometimes here, the distinction whether the former covenant is a covenant *in presenti* or a covenant *in futuro* may become important." Again, at page 334, the same author says: "According, therefore, to the present weight of American authority, the benefit of covenant against incumbrances is denied to an assignee, unless where it is so linked to another covenant as to have a prospective operation, and not to be a covenant *in presenti*."

Mrs. Watters' covenant expressed in her deed was undoubtedly *in presenti*. It was that the premises were not at that time incumbered. The tax lien existing at the time was undoubtedly a breach of this covenant of which her immediate grantor might have the benefit. The rule has been firmly established in this state that a right of action for a breach of covenant existing at the time of the conveyance does not run with the land, and does not pass to a subsequent grantee so as to vest him with a right of action therefor. *Chapman v. Kimball*, 7 Neb., 399; *Troxell v. Stevens*, 57 Neb., 329. In the case last cited it is said: "The wisdom and soundness of this rule may well be doubted, but it has been so often announced and applied by this court as to become a settled rule of property, and should be adhered to by the court until the rule is changed by appropriate legislation."

We fully concur in what Judge IRVINE has said in relation to the rule adopted. We can see no objection in this state, where chuses in action may be assigned, to a legislative declaration that a right of action for breaches of covenants of seizin and against incumbrances should in all cases be held to pass with the land so as to invest a remote grantee with a right of action for such breach. But the rule established by this court having been so long acted upon, it would be unfair to the parties who have dealt on the strength of these decisions to change the law by judicial construction, and until the legislature sees fit to change the rule, it should be adhered to.

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We therefore recommend that the judgment appealed from be reversed and the case remanded with directions to enter judgment for the plaintiff in error.

AMES and ALBERT, CC., concur.

The judgment of the district court is reversed and the cause remanded with directions to enter judgment for the plaintiff in error.

REVERSED WITH JUDGMENT.

OMAHA LOAN & TRUST COMPANY, APPELLEE, v. CHARLES F. LUELLEN ET AL., APPELLANTS.

FILED DECEMBER 3, 1902. No. 12,201.

Commissioner's opinion. Department No. 1.

1. **Mortgages: FORECLOSURE: PLEADING: BURDEN OF PROOF.** Pleadings examined, and *held* that the burden of proof was on defendants.
2. **Mortgages: FORECLOSURE: EVIDENCE: SUFFICIENT.** Evidence examined, and *held* to sustain the findings and judgment of the trial court.

ERROR from the district court for Douglas county. Tried below before DICKINSON, J. *Affirmed.*

John O. Yeiser, for appellants.

F. A. Brogan and *E. H. Scott*, *contra.*

KIRKPATRICK, C.

This is a proceeding brought by the Omaha Loan & Trust Company, appellee, against Charles F. Luellen and wife, appellants, to foreclose two separate mortgages. The petition is in the ordinary form, setting up the notes and mortgages in two separate causes of action. The answer admits the execution and delivery of the notes and mortgages, but alleged that appellants received no consideration therefor, and that the money represented by the notes and mort-

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gages was paid to one C. C. Stanley, agent of the plaintiff, and was disbursed by him, and that no accounting had ever been made by him to appellants; that appellants had made payments on the notes and mortgages aggregating \$570, and that there was less than \$400 due to appellee. To this answer was filed for reply a general denial, and in addition it was pleaded that the money represented by the first mortgage was paid direct to appellants, and that the money represented by the second mortgage was paid to C. C. Stanley at the request of appellants, and by him expended under their direction, and that all the money represented by the mortgages had been fully accounted for to appellants, and such accounting accepted and agreed to by them. In effect, the allegations of the reply amounted to a denial of the allegations of the answer.

Under this state of the pleadings the burden was upon appellants to establish the allegations of their answer. This they failed to do. Appellee offered in evidence the notes and mortgages described in the petition. It was stipulated that no action at law had been commenced on the indebtedness, and appellee thereupon rested. Appellants offered no evidence. A decree was entered foreclosing the mortgage in accordance with the prayer of the petition. Appellants having wholly failed to sustain their defense, the judgment of the trial court must be held to be right, and it is therefore recommended that the same be affirmed.

HASTINGS, C., concurs.

AFFIRMED.

THOMAS J. MALONE V. LILLIAN D. GARVER, ADMINISTRATRIX
OF THE ESTATE OF D. SCOTT GARVER, DECEASED, ET AL

FILED DECEMBER 3, 1902. No. 12,211.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: EVIDENCE CONFLICTING: FAILURE TO OBJECT.**
Where all of the evidence offered by both parties on the trial of an issue of fact is received by the court, without objection, and such evidence is conflicting, the finding of the court based thereon, unless clearly wrong, will be sustained.

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2. **Appeal and Error: EVIDENCE CONFLICTING: FAILURE TO OBJECT: QUESTION OF ADMISSIBILITY.** In such a case no legal question can arise on the admissibility of evidence.
3. **Judgment: RES JUDICATA: ISSUES, RULE AS TO.** A judgment in a former suit will not be a bar to the prosecution of an action unless the questions involved were within the issues litigated in such former suit. *Battle Creek Valley Bank v. Collins, ante, page 38, 90 N. W. Rep., 921.*
4. **Judgment: EXCESSIVE: LIMITATION OF ACTIONS.** Record examined, and found that the court excluded from its judgment a note claimed to have been barred by the statute of limitations. *Held,* That the judgment was not for too large an amount.

ERROR from the district court for Madison county. Tried below before CONES, J. *Affirmed.*

Allen & Reed, for plaintiff in error.

M. B. Foster, contra.

BARNES, C.

This case comes here by petition in error from the district court for Madison county. The suit was brought in that court by Lillian D. Garver as administratrix of the estate of D. Scott Garver, deceased, against the defendant in error, George Dechert, and the plaintiff in error, Thomas J. Malone, one as maker and the other as indorser of five certain promissory notes. It appears from the record that on the 26th day of January, 1892, George Dechert made, executed and delivered his five certain promissory notes to Thomas J. Malone; one for \$375 and four for \$37.50 each, payable at different dates, and each bearing interest at the rate of ten per cent. At the same time he gave a mortgage upon certain real estate situated in Madison county, Nebraska, to secure the payment of said notes; that thereafter, and before they became due, the said Thomas J. Malone sold, indorsed and delivered them to D. Scott Garver; and the indorsement on each of them was in writing and in the words and figures following: "Pay to the order of D. Scott Garver. Thomas J. Malone." At the

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same time he delivered to Garver the mortgage given to secure the payment of the notes. It appears that the mortgage, mentioned was a third mortgage upon real estate; that the New England Loan & Trust Company held a prior mortgage on the premises for a loan of about \$1,600, and that there was also a commission mortgage securing the sum of \$312.48 in addition thereto, all of which was prior to the mortgage delivered to Garver. It further appears that the prior mortgages had been foreclosed before this suit was commenced, and that D. Scott Garver was made a defendant to such foreclosure suit; that he filed his answer therein in the nature of a cross-bill and prayed for a foreclosure of his mortgage. It further appears that the premises were sold to satisfy the decree, and there was not enough realized from the sale to pay anything upon the amount found due the defendant Garver. It further appears that afterwards an order was made by the court permitting Garver to withdraw the notes in suit herein for the purpose of bringing an action at law thereon. That the court also, by proper order, authorized and permitted this suit to be commenced upon the notes in question, against the maker and the indorser thereof. The petition in this case was in the usual form, and set forth the foregoing facts: the defendant Malone, now plaintiff in error, filed his separate answer to the petition and alleged that it was understood and agreed between himself and D. Scott Garver, who, at the time this suit was commenced was deceased, that he should not be liable upon his indorsement but that the same was to be considered as an indorsement without recourse. He also attempted to plead other defenses, but no evidence was introduced to maintain them. A trial was had without the intervention of a jury, and the court found, on the issues joined, for the plaintiff and rendered a judgment against both Dechert and Malone for the amount found due on the notes. Dechert made no defense, and the defendant Malone prosecuted error from said judgment to this court.

1. It is contended by the plaintiff that his indorsement

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was for the sole and only purpose of transferring the title to the notes and mortgage to Garver; and that his said indorsement was to be without recourse. Counsel contends that oral evidence is competent to show that a blank indorsement was in fact one without recourse, and in support of that statement cites *Holmes v. First National Bank of Lincoln*, 38 Neb., 326; and *True v. Bullard*, 45 Neb., at page 412. These cases are not in point, because the indorsements on the notes in question herein were not blank indorsements. They are what is known by the law merchant as full or special indorsements. The indorsement is said to be special or full when it designates the indorsee by name or otherwise, as "Pay A. B. or order"; or, "pay to the order of A. B." 2 Randolph, Commercial Paper [2d ed.], section 700. An indorsement in blank consists merely of the signature of the indorsee written on the back of the instrument. 2 Randolph, Commercial Paper [2d ed.], section 705, and cases cited. In each of the cases cited the indorsement was in blank. It appears, therefore, that this court has never passed upon the question of the admissibility of parol evidence to contradict such an indorsement, or show that an indorsement in full was in fact to be treated as one without recourse. It is unnecessary for us to determine that question in this case, because all of the evidence offered upon that issue was received by the court; it was conflicting and preponderated largely in favor of the plaintiff. The record discloses that one W. M. Robertson purchased the notes and mortgage from Malone, for his client, D. Scott Garver; that at the time the purchase and transfer was made, no one was present but himself and Malone; Robertson drew his check in favor of Malone in payment for the purchase price thereof; Robertson testified that he wrote the indorsement on the notes and Malone signed the same; that no assignment of the mortgage was taken at the time, and Malone admits this. No assignment was produced upon the trial and it appears from Robertson's evidence that nothing was said whatever about limiting the indorsement, and no

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agreement was made that it should be considered as one without recourse. It was claimed by Malone that there was an assignment of the mortgage, which contained a statement that such was the agreement; this was denied by the defendant in error. Before the trial commenced counsel for Malone made a purported copy of an assignment of the mortgage, one which was made up by an examination of other recorded assignments, there being no assignment of record in this case, and in the usual manner presented such copy to counsel for the defendant and demanded the production of the original, which it was claimed was in his possession. Counsel for the defendant thereupon made an affidavit setting forth that he did not have at the time, and never did have any assignment of the mortgage in question, in his possession. It further appears in the evidence that search was made among the papers of the deceased, and that no assignment of the mortgage was ever found. In this way the alleged copy of an assignment comes into the record. This evidence was insufficient to establish the fact of an assignment of the mortgage as against the positive testimony of Mr. Robertson, the only person who acted for Garver at the time of the purchase and indorsement of the notes, that no assignment of the mortgage was ever made. The court having passed upon this issue and made its finding upon conflicting evidence, we are unable to say that such finding was clearly wrong, and the plaintiff herein must fail so far as this contention is concerned.

2. It is contended that the decree in the foreclosure case constitutes a bar to this action, for the reason that it determines the question of Malone's liability for a deficiency judgment, in his favor. This defense was not pleaded in the answer, and is therefore not available. *Thomas v. Thomas*, 33 Neb., 373; *Gregory v. Kenyon*, 34 Neb., 640. Besides an examination of the record shows us that the answer and cross-bill in that case was not framed to procure a deficiency judgment against Malone; without an additional pleading or a motion to aid it, in the absence

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of an appearance by Malone, the petition would have been insufficient to support a deficiency judgment against him. The rule established by this court upon the question of *res judicata* is, that a former judgment is a bar in a second suit between the same parties as to everything which the record shows was within the issues litigated in the former action. *Battle Creek Valley Bank v. Collins*, ante, page 38, 90 N. W. Rep., 921. The question of a deficiency judgment not having been within the issues, this action can not be said to have been barred by the decision in that case. It may be further said that the court had allowed the notes in question to be withdrawn for the purpose of bringing an action at law thereon; that it had authorized the commencement of this suit; therefore to say that this action can not be maintained because the issue might have been litigated in the foreclosure suit is to contradict the statute which at the time the foreclosure proceedings were had, gave the right of action. *Merrill v. Miller*, 2 Neb. [Unof.], 630, 89 N. W. Rep., 606.

The decree of foreclosure is silent on the question of Malone's liability for a deficiency judgment. It includes no finding on that point, and is therefore no bar to the prosecution of this action.

3. It is contended that the note for \$37.50 due March 1, 1893, was barred by the statute of limitations; that there was error in the computation of the amount due the plaintiff, and the judgment was for too large a sum. This note must have been considered barred by the court. A computation discloses that if this note had not been excluded the present judgment would have been increased by the amount of the note in question. The foregoing are all the points discussed in the brief of the plaintiff in error, and all other assignments will be considered waived.

It appears from an examination of the record that the judgment is sustained by sufficient evidence, and we therefore recommend that it be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

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NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, v. SOLON L. WILEY.

FILED DECEMBER 3, 1902. No. 12,212.

Commissioner's opinion. Department No. 3.

1. **Bills and Notes: JUDGMENT: CONFESSION BY ATTORNEY, CLAUSE PERMITTING: EVIDENCE SUFFICIENT.** Evidence examined, and *held* sufficient to sustain the verdict.
2. **Judgment: FOREIGN, ACTION ON: DEFENSE: LACK OF AUTHORITY IN ATTORNEY TO APPEAR IN FIRST ACTION.** In an action on a foreign judgment, rendered in proceedings in which there was no service of process on the defendant, and no waiver of such service, the defendant may show, as a complete defense, that the attorney who entered an appearance for him in such proceedings had no authority to do so.
3. **Bills and Notes: JUDGMENT: FOREIGN, ACTION ON: WARRANT OF ATTORNEY TO NOTE TO CONFESS: LIMITATIONS.** In an action on a foreign judgment, taken under a warrant of attorney authorizing any attorney at law to appear in any court of record, and confess judgment against the makers of a certain note, in favor of the holder thereof, *held* (1) that such warrant was not a general authority to appear and confess judgment, in any action instituted on the note, but was limited to the confession of a judgment in favor of the holder; (2) that the defendant was not estopped, by the judgment, to deny that the plaintiff was the holder of the note when such judgment was confessed; (3) that a judgment, confessed in favor of one, who at the time was not the holder of the note, was void for want of jurisdiction.

ERROR from the district court for Douglas county. Tried below before SLABAUGH, J. *Affirmed.*

Crane, Crane & Erwin and *J. J. Boucher*, for plaintiff in error.

James H. McIntosh, contra.

ALBERT, C.

In 1884, the defendant and another executed a promissory note to the plaintiff, which, in addition to the usual

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provisions, contained a warrant of attorney in this language:

"And hereby authorize N. L. Brewer, or any attorney at law in the United States, or elsewhere, to appear before any court of record, after the above obligation becomes due, and waive the issuing and service of process, and confess a judgment against us, or any or either of us, in favor of the holder of this instrument, for the amount then appearing due, together with costs of suit, and thereupon to release all errors and writs of errors, and waive all right to appeal, second trial and stay of execution in our behalf, or in behalf of either of us.

"WILEY CONSTRUCTION CO. [Seal.]

"S. L. WILEY, *Prest.* [Seal.]

"S. L. WILEY. [Seal.]"

In 1889, the plaintiff filed a petition, against the makers of the note, in the court of common pleas of the state of Ohio, for judgment thereon. No process was issued against the defendants and neither of them personally appeared in the action. An attorney at law, acting in pursuance of the warrant of attorney attached to the note, appeared on behalf of the defendants, waived the issuance and service of process and confessed judgment, in favor of the plaintiff and against the defendants, for the amount due on the note. Afterward the plaintiff brought an action on the judgment in the district court for Douglas county, against the defendant in this case. The answer, among other things, denied the existence of the judgment, and the jurisdiction of the court of common pleas to render it, and charged, generally, that such judgment was void and of no effect. The theory of the defense was that, at the time the judgment was confessed, the plaintiff was not the holder of the note on which the judgment was based, and as the authority conferred by the warrant of attorney was limited to the confession of a judgment in favor of the holder of such note, the judgment, confessed in favor of the plaintiff when it was not the holder, was without au-

thority, and the judgment rendered on such confession void for want of jurisdiction. The court recognized this theory by an instruction to the effect that if the jury found from the evidence that the plaintiff was the holder of the note when the judgment was confessed, the verdict should be for the plaintiff; otherwise, it should be for the defendant. No other question was submitted to the jury. There was a verdict for the defendant, and judgment was given accordingly. The plaintiff brings error.

The plaintiff insists that it was error to submit the theory of the defense to the jury, and, in this behalf, first urges that the evidence is insufficient to support such theory. It would serve no useful purpose to set out the evidence bearing on this question. We have examined it with some care; were it within our province to weigh it, we might arrive at a different conclusion than that reached by the jury, but we are by no means sure that we should. We consider the evidence ample to warrant a finding in favor of the defendant on the question submitted to the jury.

It is next urged that the question, whether the plaintiff was the holder of the note when the judgment was confessed, is only *quasi*-jurisdictional, and one that is conclusively presumed to have been litigated and disposed of in the action which resulted in the judgment in question. In support of this position, the plaintiff cites the general rule stated in 12 Ency. Pl. & Pr., 211, in this language: "When jurisdiction depends on a fact that is litigated in a suit, and such fact is found in favor of the party who avers jurisdiction, the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence thereof until set aside or reversed by a direct proceeding." This rule, we think, is hardly applicable to the facts in this case. An examination of the authorities cited in support of the rule will disclose that, so far as personal actions are concerned, it applies only to cases where the parties are in court, and the jurisdiction depends on some fact or facts, litigated in the action. But in an action on a

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foreign judgment, however solemn the asseverations of the record of the jurisdictional steps, the defendant may show, as a complete defense, that he was never given an opportunity to defend, and never had his day in court. *Thompson v. Whitman*, 18 Wall. [U. S.], 457; *Knowles v. Gas Light Co.*, 19 Wall. [U. S.], 58, *Hall v. Lanning*, 91 U. S., 160; *Pennoyer v. Neff*, 95 U. S., 714; *Cole v. Cunningham*, 133 U. S., 107; *Simmons v. Saul*, 138 U. S., 439; *Thormann v. Frame*, 176 U. S., at page 356; *Bell v. Bell*, 181 U. S., 175. It is the settled rule in both the state and federal courts, that, in an action on a foreign judgment, the defendant may successfully defend, by showing that the attorney, who entered an appearance for him, had no authority to do so. *Baltzell v. Nosler*, 1 Ia., 588; *Harris v. Hardeman*, 14 How. [U. S.], 333; *Sherrard v. Nevius*, 2 Ind., 241; *Thompson v. Emmert*, 15 Ill., 415; *Gleason v. Dodd*, 4 Met. [Mass.], 333; *Aldrich v. Kinney*, 4 Conn., 380; *Starbuck v. Murray*, 5 Wend. [N. Y.], 148; *Wilson v. Bank of Mount Pleasant*, 6 Leigh [Va.], 570; *Norwood v. Cobb*, 24 Tex., 551; *Rape v. Heaton*, 9 Wis., 301; *Price v. Ward*, 25 N. J. Law, 225.

The inquiry in this case, then, narrows down to this question: assuming that the plaintiff was not the holder of the note at the time the judgment was confessed, was the attorney, who entered an appearance in the court of common pleas on behalf of the defendant, and confessed such judgment, authorized to do so? If he were, it was by virtue of the warrant of attorney. The authority conferred by such instruments has always been strictly construed. In *Spence v. Emerine*, 46 Ohio St., 433, it was held, that a warrant of attorney, authorizing the confession of judgment in favor of the payee of a note, would not authorize a confession of judgment in favor of a transferee of such note, and that a judgment, taken on such confession, was void for want of jurisdiction. In *Cushman v. Welsh*, 19 Ohio St., 536, it was held, that authority to confess judgment, in favor of the legal holder of a note, would not authorize a confession of judgment in favor of a holder without indorsement, he not being the legal holder.

In the present case, as we have seen, the authority conferred by the warrant of attorney was not a general authority to enter an appearance and confess a judgment in any action that might be instituted on the note, but was limited to the confession of a judgment in favor of the holder. Had the authority been to confess judgment in favor of A, it will not be claimed that a valid judgment could have been confessed in favor of B. We are unable to see how the fact that the person in whose favor the judgment was to be confessed was described, instead of being mentioned by name, would make any difference. We can readily see how, if the rights of third parties had intervened, the defendant might be embarrassed by the doctrine of the ostensible authority of an agent. But no such question arises in this case. The plaintiff is here seeking to enforce a judgment which, for the purposes of the argument, it is forced to admit was confessed in its favor, at a time when it was not the holder of the instrument on which the judgment is based, by an attorney whose authority was limited to a confession of judgment in favor of the holder. Such admission, in our opinion, is fatal to the plaintiff's contention, because it not only shows that the judgment was rendered without jurisdiction, but, also that it was rendered in favor of a party not entitled to it. Such a judgment lacks every element of an estoppel and is worthless for any purpose.

It is claimed by the plaintiff that the answer does not cover the theory on which the case was submitted to the jury. The answer alleges that the court of common pleas was without jurisdiction and that the judgment is void. If there be a fault in the answer it is that some of the allegations should have been more specific. The remedy for such fault as is well known is by motion. The answer is sufficient to sustain the theory of the defense, when assailed as in the present case.

It is recommended that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

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NOTE.—On May 19, 1903, a petition for a writ of error to the supreme court of the United States was filed in this court in the above case by the plaintiff in error, and was allowed by the court. The cause is now pending in said United States court.—REPORTER.

HENRY RIECK, APPELLEE, V. ABRAM ZOLLER ET AL., AP-
PELLANTS, ET AL.

FILED DECEMBER 3, 1902. No. 12,216.

Commissioner's opinion. Department No. 2.

Mortgages: FORECLOSURE: OBJECTIONS FRIVOLOUS. Objections to a confirmation of sale in a foreclosure proceeding examined, and *held* frivolous and without merit.

APPEAL from the district court for Douglas county.
Tried below before KEYSOR, J. *Affirmed.*

Hiram A. Sturges, for appellants.

Charles Battelle, *contra*.

OLDHAM, C.

This is an appeal from an order of confirmation of sale in a foreclosure proceeding. The first question urged is that the appraisement was too low. The property was appraised at \$24,000 and sold for \$19,000. Affidavits and counter-affidavits were filed as to the actual cash value of the property. Some of the affidavits placed the value as low as \$12,000 and others as high as \$48,000. Under a well established rule we can not review the action of the trial court in overruling this objection in this condition of the record. Another objection is that the certificate of the sheriff attached to the appraisal had no internal revenue stamp affixed thereto. A sufficient answer to this objection is that under the rulings of the United States commissioner of internal revenue, of January 9, 1900, no such stamp was required. The next ob-

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jection was that one of the appraisers signed the appraisal by his initials. This objection is purely frivolous.

It is therefore recommended that the judgment of the district court be affirmed.

POUND and BARNES, CC., concur.

AFFIRMED.

THE MICHIGAN TRUST COMPANY, EXECUTOR OF THE ESTATE
OF JOHN W. MOON, DECEASED, ET AL., APPELLANTS, V.
THE CITY OF RED CLOUD, APPELLEE.

FILED DECEMBER 3, 1902. No. 12,272.

Commissioner's opinion. Department No. 3.

1. **Limitation of Actions: LACHES: ACTION BROUGHT WITHIN TIME.** Laches cannot usually be charged against a party for failing to bring an action to enforce an equitable claim if he acts within the time allowed by the statute of limitations for commencing a corresponding action at law.
2. **Trusts: TRUST DEEDS: FORECLOSURE: PARTIES.** One of several parties whose debt is secured by a trust deed may maintain an action to foreclose the same on behalf of himself and the other parties interested in the security, and the court will distribute the fund arising from a sale of the property among those entitled thereto.
3. **Mortgages: DEBT OF THIRD PARTY: FORECLOSURE: STATUTES, COMPLIANCE WITH.** Where a mortgage is made to secure the debt of a third party it is a sufficient compliance with sections 850 and 851 of the Code of Civil Procedure to allege and show that judgment has been obtained against the party whose debt the mortgage was made to secure and that the sheriff has made a return to an execution issued on such judgment "no property found."
4. **Trusts: TRUST DEED: EXTENSION OF PAYMENT: POWER OF GRANTORS OVER CONDITIONS OF SALE.** Where the creditors of a bank agree to an extension of time of the payment of their claims on the condition, among others, that certain of the stockholders or the bank shall secure the payment of such claims by the execution of a trust deed to real estate, the grantors in such deeds can not, by an agreement among themselves and without the consent of the creditors, determine the order in which the trust property shall be sold, or compel the creditors to exhaust the property of one before that of another is resorted to.

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5. **Trusts: TRUST DEED: CONDITIONS AS TO RECONVEYANCE: PAYMENT OF UNSECURED DEBTS.** Where a trust deed is made to secure the payment of certificates of an insolvent bank and contains a condition that upon the payment of the sum of ten thousand dollars to the trustee the property shall be reconveyed to the grantor, the payment of such sum to the trustee entitled the grantor to a reconveyance, but the purchase by the grantor of debts owing by the bank and especially of debts of a class not secured by the trust deed, does not release the trust estate from liability.
6. **Vendor and Purchaser: NOTICE OF LIEN, ACTUAL: EFFECT.** One who purchases land with knowledge or notice that another holds a lien against the same to secure the payment of a debt, takes the land subject to such lien although the same has not been recorded

APPEAL from the district court for Webster county.
Tried below before ADAMS, J. *Affirmed.*

Tibbets Bros. & Morey, for appellants.

George R. Chaney, contra.

DUFFIE, C.

In July, 1893, the Farmers & Merchants Banking Company, doing business at the city of Red Cloud, became financially embarrassed, and the directors determined to suspend business and devote their energies to realizing on the assets held by the bank. They submitted a proposition to the creditors of the bank for an extension of one year from July 10, 1893, to enable them to liquidate, the creditors to accept certificates to be issued by the banking company payable July 10, 1894, the payment of these certificates to be guaranteed by the directors. Trust deeds were also made by the directors conveying real estate of the appraised value of over \$55,000 to Charles W. Kaley as trustee. Whether the proposition to the creditors for an extension of time embraced the proposal to secure their indebtedness by these trust deeds, as well as by the individual guarantee of the directors, is one of the matters in dispute, the appellant claiming that the creditors extended the time of payment on an agreement for security by the guarantee of the directors alone; while the appellee insists

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that the creditors contracted for the security offered by the trust deeds in addition to the individual guarantee of the directors.

Most of the creditors of the bank accepted the proposition and received certificates for the amount due them, in the following form:

"RED CLOUD, NEB., Jul. 28, 1893.

"This certifies that is a depositor with the Farmers & Merchants Banking Company, Red Cloud, Nebraska, in the sum of Dollars, payable to the order of himself at the banking house of the F. & M. Banking Company, Red Cloud, Nebraska, July 10, 1894, or at the option of said bank at any time prior to said date. This certificate bears interest at the rate of seven per cent. per annum.

"THE FARMERS & MERCHANTS BANKING COMPANY,
"By P. A. BEACHY, *A. Cashier.*"

Indorsed on the back as follows:

"Guaranteeing payment at maturity.

"SILAS GARBER.

"R. D. BEDFORD.

"GEO. O. YEISER.

"W. S. GARBER."

John W. Moon, a resident of Michigan, was a stockholder of the banking company, and among the other trust deeds executed to secure the payment of these certificates was one made by said Moon and wife conveying to Kaley, trustee, lots 7 and 8 in block 5 in the original town of Red Cloud. This deed recites:

"That John W. Moon and Alice M. Moon, his wife, of the county of Muskegon and state of Michigan, for and in consideration of one dollar in hand paid, do hereby grant, bargain, sell, convey and confirm unto Charles W. Kaley, trustee, of the county of Webster and state of Nebraska, the following described real estate situated in Webster county and state of Nebraska, in trust, however, for the following purposes only: On the 10th day of July,

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1894, or at any time thereafter at the request of the owner of any certificate of deposit of the Farmers & Merchants Banking Company of Red Cloud, Nebraska, guaranteed by the following named persons, to wit: Silas Garber, Geo. O. Yeiser, R. D. Bedford and W. S. Garber: To sell and convey not exceeding ten thousand dollars worth, as shall be necessary to pay any amount that may be due upon any such guaranteed certificates, and upon the payment of such certificates to reconvey to the grantor hereof, his heirs and assigns, the land remaining unsold after the payment of such certificates. And the grantee hereof is directed, authorized, and by the reception of this instrument agrees to reconvey to the grantor hereof, his heirs or assigns, all the following described land upon the payment or deposit by said grantor to or with said trustee of the sum of ten thousand dollars, or so much thereof as may be necessary to pay his *pro rata* share of the amount due on such certificates of deposit."

In addition to this deed, trust deeds were also executed by the Farmers & Merchants Banking Company, Silas Garber and wife, W. S. Garber and wife, George O. Yeiser, P. D. Yeiser and R. D. Bedford, the total appraised value of all of the real estate conveyed by these several parties being, as before stated, something in excess of \$55,000. The deeds executed by the parties other than Moon contained the following condition:

"In trust, however, for the following purposes only: On the 10th day of July, 1894, or at any time thereafter, at the request of the owner of any certificate of deposit of the Farmers & Merchants Banking Company, Red Cloud, Nebraska, guaranteed by the following named persons, to wit: Silas Garber, George O. Yeiser, R. D. Bedford and W. S. Garber, to sell and convey so much of said real estate as shall be necessary to pay any amounts that may be due upon any of such guaranteed certificates, and upon the payment of such certificates to reconvey to the grantor hereof, his heirs and assigns, the lands remaining unsold after the payment of such certificates."

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It will be noticed that none of these deeds, except that of Moon, contained a provision requiring the trustee to reconvey upon the payment to him of a certain amount, nor do they limit the amount for which the land stands pledged, the Moon deed being the only one in which these conditions are expressed. The Moon deed bears date July 20, 1893, and some of the others were not executed until the 24th day of July, 1893. These deeds were not delivered directly to Kaley, the trustee, but were deposited with Charles Wiener, at that time mayor of the city of Red Cloud, who executed the following receipt therefor:

"This certifies that I, Charles Wiener, of Red Cloud, Nebraska, hold in my possession deeds executed by Silas Garber and wife, J. W. Moon and wife, George O. Yeiser, P. D. Yeiser, R. D. Bedford and W. S. Garber and wife, in trust for the depositors of the Farmers & Merchants Banking Company of Red Cloud, Nebraska, which deeds I hold under the following condition, to wit: If the management and control of the assets of the Farmers & Merchants Banking Company of Red Cloud, Nebraska, be given to and continued in the directory thereof for the purpose of converting the same into money and paying the creditors of said bank, then on the 10th day of July, 1894, I am to deliver the said deeds to the grantee therein named. If, however, the management and control of said assets be taken from said directory, whether by the appointment of a receiver or otherwise, or if suit be brought in any way restraining or interfering with such management and control by the directory, then I am to return said deeds to the grantors thereof, their respective heirs or assigns."

The deeds conveyed the following lots and lands, to wit: (Here follows a description of the real estate conveyed, together with an appraisal of the value of said real estate made by D. L. Grote, J. C. Warner and T. J. Myers.) At the same time the following paper was placed in the hands of Wiener to be by him delivered to Kaley, trustee, together with the deeds in case the certificates referred to

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were not paid at maturity and a delivery of the deeds to the trustee became necessary:

"To C. W. Kaley, Trustee:

"SIR: You are hereby instructed to dispose of the land conveyed to you by the undersigned in payment of the debts of the Farmers & Merchants Banking Company, Red Cloud, Nebraska, which shall be outstanding on the 10th day of July, 1894, in the following order, to wit: 1st. You are to sell the property conveyed to the bank. 2d. The property conveyed by the resident stockholders. Finally, the property conveyed by Mr. J. W. Moon.

"Signed in duplicate this 24th day of July, 1894, at Red Cloud, Nebraska.

"FARMERS & MERCHANTS BANKING CO.,

"By SILAS GARBER, *President.*

"SILAS GARBER.

"GEORGE O. YEISER.

"R. D. BEDFORD.

"P. D. YEISER.

"W. S. GARBER."

There was also delivered to Wiener at the same time the following paper:

"To Charles Wiener, depositary of the deeds of the undersigned stockholders of the Farmers & Merchants Banking Company, Red Cloud, Nebraska:

"SIR: You are hereby instructed to return to the grantor thereof any deed in your hands upon the deposit by said grantor with you of money or certificates of deposit of said bank, equal in face value to the appraised value of the lands described in said deeds, and to permit the grantor of any deed to erase therefrom the description of any land therein conveyed upon the deposit by said grantor of money or certificates of deposit of said bank equal in face value to the appraised value of the land erased. The certificates of deposit above named are such certificates as have been or shall be issued to the present depositors of said bank for the deposits now owing by said bank.

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"Signed in duplicate this 24th day of July, 1894, at Red Cloud, Nebraska.

"FARMERS & MERCHANTS BANKING COMPANY,

"By **SILAS GARBER**, *President*.

"**SILAS GARBER**.

"**GEORGE O. YEISER**.

"**R. D. BEDFORD**.

"**P. D. YEISER**.

"**W. S. GARBER**.

"I hereby acknowledge the receipt of the foregoing instructions and agree to be governed thereby.

"**CHAS. WIENER**."

These deeds were never delivered to the trustee, who refused to accept the trust, and remained in the possession of Wiener until some time in January, 1898. In the meantime, and previous to the last named date, Wiener, who had been engaged in business in Red Cloud, had sold his business to Isadore Freymark. This sale also included Wiener's safe in which the deeds were placed for safe keeping, and in this manner Freymark came into possession of all the trust deeds. On the 14th day of January, 1898, John W. Moon filed a petition in the district court of Webster county, making Isadore Freymark the sole party defendant, in which it was alleged that on or about the — day of —, 1893, he had executed and delivered to one Wiener a certain deed whereby he conveyed the following described real estate, to wit, lot 8, in block 5, in the city of Red Cloud, to one Charles W. Kaley as trustee, upon an agreement that said Kaley should accept the trust and said land be disposed of in such manner as might be by him deemed best in order to secure the indebtedness of the Farmers & Merchants Bank of said county and state, and thereby relieve the stockholders of said banking company from liability; that he was at that time and still remains a stockholder in said bank. He alleged further that said Kaley refused to accept said trust and that the deed above mentioned remained in the hands of one Charles Wiener but that said trust had never since

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that date been enforced; that said deed was in the hands of one Freymark by virtue of its deposit with said Wiener; that the conditions of said trust had failed of their purposes on account of the failure of the trustee named to accept the trust or any other person agreed upon according to the terms of the trust; that the deed became and remains a cloud upon the title to the property described therein. The prayer was for a decree of court ordering said deed to be delivered up to the plaintiff, or upon failure to so deliver, that said decree operate as a cancellation thereof. No summons was issued in the case, but on the same day on which the petition was filed, Freymark made a voluntary appearance and filed his answer, waiving service and return of summons, admitting the execution and delivery of the deed and that he was in possession thereof as charged in the petition; alleging that he had no knowledge of the condition under which said deed was made, and denying every other allegation of the petition. On the same day a decree was entered in the case ordering the defendant to deliver said deed to the plaintiff, and in default of such delivery, that the deed be canceled, the decree to serve as an absolute cancellation thereof.

On the 15th day of March, 1899, the city of Red Cloud filed what is called an answer and cross-complaint in the above entitled action of John W. Moon against Isadore Freymark, in which is set out the circumstances under which the trust deed in controversy was made, and asking that the city of Red Cloud be decreed to have a first lien upon said lot for something over \$5,000, for which it held a certificate of deposit guaranteed by the directors of the bank, and which had been reduced to judgment on the 10th day of January, 1898. Prior to the filing of this answer and cross-complaint Moon had deceased, and the Michigan Trust Company had been appointed executor of his estate. A summons had been issued on this cross-complaint and served upon the Michigan Trust Company, and on the 19th day of July, 1899, the trust company made a special appearance for the purpose of objecting to the

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jurisdiction of the court. It will be unnecessary to notice all the proceedings had in the district court from that time up to the entry of the decree appealed from in this action. It is sufficient to say that such proceedings were had that the city of Red Cloud finally presented a case to the district court asking for the cancellation of the decree in the case of *Moon v. Freymark*, and praying for the foreclosure of the trust deed made by Moon, and a decree ordering lots 7 and 8 sold for the satisfaction of its judgment obtained on the 10th day of January, 1898, on the certificate of deposit issued by said bank to the city and guaranteed by the directors.

In the meantime, and on the 20th day of July, 1899, Robert Damerell had purchased from the Michigan Trust Company, as executor of the estate of John W. Moon, the lots in controversy, and he was made a party to the action, it being sought to make any interest which he might have in the lots by virtue of such purchase subject to the lien claimed by the city by virtue of the trust deed aforesaid. On the final trial in the district court a decree was entered by which it was found that there was due to the city from the Farmers & Merchants Banking Company the sum of \$6,497.30; that Moon in his lifetime had executed and delivered the trust deed mentioned in the cross-complaint to secure certain debts of the Farmers & Merchants Banking Company of which the debt due the city was one; that said trust deed thereby became and now is a first lien on lot 8 securing said debt.

The court further found that Robert and Mary Damerell were innocent purchasers of lot 7 in block 5 without any notice of the claim of the city against the same. A decree of foreclosure was entered against lot 8 and an order for the sale of said lot to satisfy the claim of the city was entered and the sheriff directed to bring the proceeds of any sale into court for distribution by the court on the confirmation of the sale. From this decree the Michigan Trust Company and Robert and Mary Damerell have appealed to this court.

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It is first insisted by the appellants that the city was guilty of laches in not enforcing its claim at an earlier date. It was formerly held that the statute of limitations did not apply in equity actions, and this is the rule still followed in some jurisdictions, but the general rule in all code states is that the statute applies as well to actions in equity as to those at law; and the converse of the proposition is also true, that equitable relief will not be refused where the delay is not sufficient to bar the corresponding legal remedy. *Coryell v. Klehm*, 157 Ill., 462; *McDermont v. Anahcim Union Water Co.*, 124 Cal., 112; *Platt v. Platt*, 58 N. Y., 646. We do not think that this objection can be sustained.

It is further insisted that the necessary parties plaintiff and defendant were not impleaded in the action. The claim of the city against the banking company was first evidenced by a certificate of deposit made payable to one Cook, city treasurer. It is undisputed, however, that the city itself, in an action brought against the banking company, recovered judgment upon this certificate. Whatever may have been the form of the original indebtedness, there is no question that now it has been merged in a judgment in favor of the city. To enforce this judgment, or any lien which stood as security for the debt, no other party than the city itself is a necessary party plaintiff. Whatever objection might have been made to the city suing as sole plaintiff upon a certificate issued to its treasurer, no objection, we think, can be made against the city as sole plaintiff pursuing its remedies to enforce the payment of that judgment or to enforce a lien by which the debt was secured.

It is further insisted that the trust deed in question, if enforced at all, should be enforced for the benefit of all holders of certificates issued by the bank and guaranteed by its directors which are still outstanding and unpaid. This is undoubtedly true, but because all parties secured by that trust deed are equally entitled to its benefit, and to the benefit of any decree entered for its foreclosure, does

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not by any means support the proposition that all these parties must join as plaintiffs in a suit in which the foreclosure of the security is sought. The holders of these certificates are in the same position as the different holders of bonds secured by a mortgage. No court, so far as we are able to discover, has ever yet held that the holder of such bonds is precluded from seeking the benefit of his security by the foreclosure of the mortgage for the reason that he may not know the name and residence of the other bondholders and is therefore unable to make them parties to his bill.

In 2 Jones, Mortgages [5th ed.], section 1385, it is said: "A holder of bonds secured by a mortgage may file a bill to foreclose on behalf of himself and the other bondholders, whose rights the court will protect, though they be not made parties and do not appear. * * * This is in accordance with the equitable principles already stated, and adopted in the several codes, that one or more of many persons having a common interest, or of persons so numerous as to render it impracticable to bring them all before the court, may sue on behalf of the whole."

The petition upon which the decree in this case was entered recites that: "The plaintiff herein brings this suit on its own behalf and on behalf of all other beneficiaries in the trust deed hereafter mentioned who choose to come in and contribute to the expenses of this suit." This, we think, is a sufficient allegation to show that the plaintiff is not suing for itself alone but for all parties for whose benefit the trust deed was made, and it will be the duty of the court, before a distribution of any sum realized from a sale of the trust property is made, to make such proper order and direct such proper notice as may be necessary to give all those interested in the fund an opportunity to assert and prove their claims and establish their right to participate in the distribution. A further objection is made that the petition contains no allegation "that no proceedings have been had at law for the recovery of the debts secured thereby or any part thereof." While

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this is true, the petition does in express terms allege that a judgment was recovered against the banking company on the 10th day of January, 1898, and that execution has been issued on this judgment and returned unsatisfied. Section 851 of the Code provides that in foreclosure proceedings, "if it appear that any judgment has been obtained in a suit at law for the money demanded by such petition, or any part thereof, no proceeding shall be had in such case unless, to an execution against the property of the defendant in such judgment, the sheriff or other proper officer shall have returned that the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy such execution except the mortgaged premises."

The allegations of the petition we think fully satisfy the statute. Moon, the maker of the trust deed, was not directly indebted to the plaintiff. There was no evidence of indebtedness existing between the city of Red Cloud and Moon upon which an action at law could be maintained. The trust deed was made to secure a debt due from a third party, viz.: The Farmers & Merchants Banking Company. An action at law had been commenced upon this debt, judgment therein entered, and an execution returned unsatisfied. There were no further legal steps which the plaintiff could pursue before seeking to appropriate the mortgaged property. The city had exhausted its legal remedy for the collection of the claim and this was fully shown by the statements of the petition. It is also urged that the agreement entered into between Moon and the banking company, and deposited with the deed of trust, had not been complied with on the part of the city. This objection leads to a consideration of the contract entered into between the parties. As recited in the statement of facts, the appellants claim that the creditors of the bank agreed to an extension of one year for the payment of their claims in consideration of the issue to them of certificates of deposit issued by the bank and guaranteed by the directors; while the claim of the city, as we under-

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stand it, is that the creditors were to be secured not only by such guaranteed certificates but by trust deeds executed by Moon and the several directors. While the testimony does not leave this question entirely free from doubt, we think that the finding of the court is supported by the evidence. W. S. Garber, the cashier of the bank and the party who acted for it in procuring an extension of time from its depositors, testified as follows:

Q. What arrangements, if any, were made by the Farmers & Merchants Banking Company, after its suspension, with its creditors for an extension of time in which to pay them?

A. The directors, through me, solicited a year's extension on claims, and individually secured them in addition to the bank's assets and stock for the final liquidation of all claims.

Q. What notice, if any, was given to the creditors by you of the proposition of the stockholders for an extension of time in which to pay the banking company's debts?

A. I can not recall at this time whether any formal notice was given. My recollection is that it was a matter of personal negotiation with each creditor.

Q. What security, if any, was given by the stockholders in consideration of the extension of time of payment on the part of the creditors?

A. The directors individually deposited in trust, deeds to certain real estate upon certain conditions, those trust deeds to be made available in event of the bank's assets proving insufficient to liquidate the bank's indebtedness.

Q. State if you know what security John W. Moon gave in consideration of the extension of the time of payment of the banking company's indebtedness.

A. I could not state definitely but my recollection is he deposited deeds to certain business blocks or block situated in the city of Red Cloud.

* * * * *

Q. State if you know who drew up this Moon deed.

A. I drew it.

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Q. At the time this deed was delivered to Mr. Moon was the Farmers & Merchants Banking Company indebted to the city of Red Cloud in any amount, and if so what was the amount of the indebtedness?

A. The bank was indebted to the city of Red Cloud in the sum of \$6,000 deposited in the name of Henry Cook, city treasurer, on open deposit account.

Q. Was this indebtedness of the banking company to the city of Red Cloud extended under this agreement between the stockholders, the officers of the banking company and the creditors?

A. It was.

On cross-examination he was asked the following question:

Q. In making this arrangement which you have testified to, the various deeds were drawn by the various stockholders or directors of the bank running to C. W. Kaley, trustee, and as a part of the same transaction: The various documents attached as exhibits to the deposition of Charles Wiener (referring to the directions given to Wiener as depositary of the deeds and to Kaley as trustee) were drawn and accompanied the delivery of such deeds to such proceedings as the conditions and limitations upon such delivery and were made and intended to be binding upon such custodian and such trustee in the performance and execution of the trust sought to be created by such documents and such deeds. Is that your understanding of the relationship between those exhibits and the deeds so delivered as testified to by you?

A. No, that is not my understanding. It is my understanding that the stockholders individually deeded their property to the trustee without limitation; that by an agreement between the stockholders, the custodian, and the trustee, we directed the manner in which the property should be disposed of if any occasion arose for its disposal.

The conclusion to be drawn from this evidence is that there was an understanding between Garber, as cashier and agent of the bank, and the creditors, that the exten-

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sion asked would be granted upon condition that the certificates of the bank should be guaranteed by the directors and further secured by the trust deeds above named; that when the deeds were made out and deposited with Wiener, the grantors in those deeds agreed among themselves that the trust property should be sold in the following order: 1st. The property of the bank. 2d. The property of the resident directors. 3d. The property conveyed by Moon. As between Moon and the other parties Moon had a right to have their property first exhausted before resorting to his; but as against the claim of the creditors, Moon and the bank officers could make no agreement which could affect the right of any creditor to resort to any of the trust property which he might seek to appropriate for the payment of his claim. Where two parties become surety for the payment of a debt owing by another, they can, as between themselves, agree that the property of one shall be primarily liable, but in the absence of an agreement by the creditor to recognize such agreement and to be governed by it, if he has to resort to the security, he has a right to proceed against either of the sureties, both being primarily liable so far as he is concerned.

It is also insisted that Moon has performed the condition upon which the property described in the trust deed was to be reconveyed to him. The evidence discloses that Moon in his lifetime, and his executors thereafter, took up about \$11,000 of the indebtedness of the bank, and this, it is insisted, is a greater amount than his property stood pledged to secure and should operate as a release from any claim asserted against it by the bank creditors. There are two answers to this proposition. The trust deed contains the following condition: "And the grantee hereof is directed, authorized, and, by the reception of this instrument, agrees to reconvey to the grantor hereof, his heirs or assigns, all the following described land upon the payment or deposit by said grantor to or with said trustee of the sum of \$10,000, or so much thereof as may be necessary to pay his *pro rata* share of the amount due on said cer-

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tificates of deposit." The certificates of deposit referred to are the guaranteed certificates as appears from the first condition recited in the deed, which is as follows: "To sell and convey not exceeding \$10,000 worth as shall be necessary to pay any amount that may be due upon such guaranteed certificates, and upon the payment of such certificates to reconvey to the grantor hereof, his heirs and assigns, the land remaining unsold after the payment of such certificates."

No one will question the right of Moon, his heirs or executors, to have the property reconveyed either upon the payment of \$10,000 or the deposit with the trustee of \$10,000 in value of the guaranteed certificates. The evidence clearly shows that but a small portion of the \$11,000 of the indebtedness of the bank taken up by Moon and his executors was represented by such guaranteed certificates. In one instance a judgment against the bank in favor of Bedford, amounting to about \$6,000, was purchased by Moon. The debt upon which this judgment was entered was not wholly represented by guaranteed certificates but was principally upon an open account, and some suspicion might be cast upon the validity of the judgment from the fact that Bedford saw fit to assign it for a consideration of \$1,000 evidenced by two notes which were to become due and payable only in case said judgment should be set aside.

A further reason arises from the fact that it is not pretended that Moon has paid and extinguished any amount due from the bank to its creditors. In his answer it is alleged: "That said John W. Moon in his lifetime, and this defendant thereafter, have paid upwards of \$11,000 worth of debts of said banking company so existing at the time of said alleged trust agreement, taking assignments thereof in the names of various parties, and especially in the name of the widow of said John W. Moon, deceased, for the purpose of keeping such claims alive for the final adjustment of the equities as among the shareholders of said banking company, and thereby said John W. Moon and his estate

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have contributed more than his portion as a shareholder of said banking company toward the payment of its liabilities."

This plea does not claim or pretend that the \$11,000 is not still an indebtedness due from the bank. In the words of the plea it was "kept alive" and is still an indebtedness due from the banking company, the change in the ownership of the claims not in any manner working an extinguishment of the debt.

On the part of the Damerells it is claimed that they are innocent purchasers of the property without any notice or knowledge of the existence of the trust deed and that their claim of title should be quieted and confirmed. It will be noticed that while the trust deed conveys two lots, 7 and 8 in block 5, Moon's petition filed in the district court to have this deed canceled, described it as conveying only lot 8. It is doubtful whether any officer of the city, except Wiener, with whom the trust deeds were deposited, had any knowledge of the description or amount of the property conveyed thereby, and it is evident that the attorneys for the city on filing their first pleadings attacking the decree in *Moon v. Freymark*, had no knowledge that lot 7 was included in the Moon deed. It was not until the 22d day of December, 1900, that any pleadings on behalf of the city asserted any claim against lot 7, and prior to that time and on the 20th day of July, 1898, Damerell had purchased and paid for these lots. There is evidence in the record from which the court might have found that Damerell had knowledge of the claim of the city made against these lots prior to his payment of the purchase price, but we think that the evidence is entirely satisfactory that he had knowledge of the claim asserted by the city against lot 8 prior to his purchase and payment of the consideration, and that the findings of the district court in that regard are amply sustained.

The foregoing, we think, disposes of all material matters presented for our consideration, and from as careful an examination as we could give a record confusing to a de-

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gree beyond description because of the numerous motions, amended pleadings, and exceptions and objections made in the shape of formal pleadings filed in the case, we are satisfied that the district court entered the proper decree and that the judgment appealed from should be affirmed, and so recommend.

AMES and ALBERT, CC., concur.

AFFIRMED.

NOTE.—A rehearing in the above case was granted and an opinion on rehearing, by ALBERT, C., SULLIVAN, C. J., concurring specially, filed July 3, 1903. This opinion vacated the judgment reported *supra*, and reversed the judgment of the lower court. It is reported in — Neb., —, 96 N. W. Rep., 140. February 4, 1904, an opinion was filed, by SEDGWICK, J., denying a second rehearing. This opinion is reported in 98 N. W. Rep., 413.—REPORTER.

GEORGE BURKE, APPELLEE, V. JOHN S. TEWKSBURY ET AL.,
APPELLANTS.

FILED DECEMBER 3, 1902. No. 12,294.

Commissioner's opinion. Department No. 3.

1. Judgment: CESTUI QUE TRUST, AGAINST: CREDITOR'S SUIT AGAINST TRUST ESTATE: INSOLVENCY. In an action to subject real estate, the title to which is held in trust, to the payment of a judgment against the *cestui que trust*, it is immaterial whether the *cestui que trust* was insolvent, or indebted to the judgment creditor, when the trust was created.
2. Creditor's Suit: TRUST ESTATE, AGAINST: EVIDENCE SUFFICIENT. Evidence examined, and held sufficient to sustain the decree of the district court.

APPEAL from the district court for Douglas county
Tried below before FAWCETT, J. *Affirmed.*

Hamilton & Maxwell, for appellants.

A. H. Murdock, contra.

Burke v. Tewksbury.

ALBERT, C.

This is an action in the nature of a creditors' bill, brought by George Burke against John S. Tewksbury and Alvira C. Tewksbury, husband and wife, to subject certain property, the title of which stood in the name of Alvira C. Tewksbury, to the satisfaction of a judgment against her co-defendant. The district court granted the relief prayed and the defendants bring the case here on appeal.

The first contention of the appellants is, that the petition fails to state a cause of action for the reason that it contains no allegation to the effect that at the time the title of the property was taken in the name of Alvira C. Tewksbury, her co-defendant was insolvent, nor that he was in any manner indebted to the appellee at that time. This is not an action to set aside a fraudulent conveyance but to subject certain property, of which it is alleged one of the defendants stands seized, to the use of the other to the satisfaction of a judgment against the latter. The gist of the action is whether the title is held in trust for the benefit of the judgment debtor. If it is he is the real owner and the property is liable for the satisfaction of his debts, whether he was insolvent or indebted to the judgment creditor when the trust was created or not. *Taney v. O'Connell*, 27 Pac. Rep. [Colo.], 888. It is urged, however, that the allegation that Mrs. Tewksbury holds the title in trust for her husband is a mere conclusion and not sufficient to overcome the presumption that the conveyance to her was in the nature of a gift or advancement from her husband. The allegations, as to the trust character of the property, are not confined to such conclusion. On the contrary, it is specifically alleged that the consideration was paid exclusively by the husband and the title taken in the name of his wife for the purpose of concealing the same from the creditors of the husband and hindering and defrauding such creditors. These allegations, taken in connection with the conclusion referred to based thereon, in our opinion, are sufficient to rebut the presumption of a gift to the wife.

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It is next urged that the evidence is insufficient to sustain the decree. In this behalf it is claimed that the evidence not only fails to establish the controverted allegations of the petition, but that it does establish the homestead character of the property. In cases of this kind, to set out the evidence bearing on such issues would amount to a reproduction of the bill of exceptions which, in this case, covers some 80 pages. It must suffice to say that we have examined the evidence from beginning to end, and find it abundantly sufficient to sustain the decree of the district court.

It is recommended that the decree of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

WILLIAM E. PALMER V. FIDELITY MUTUAL FIRE INSURANCE
COMPANY.

FILED DECEMBER 3, 1902. No. 12,343.

Commissioner's opinion. Department No. 3.

Trial: DIRECTING VERDICT: EVIDENCE: INSUFFICIENT. When the plaintiff has rested his case without sufficient evidence to sustain a verdict in his favor, the court should instruct the jury to return a verdict for the defendant.

ERROR from the district court for Frontier county.
Tried below before NORRIS, J. *Affirmed.*

S. A. Searle, for plaintiff in error.

Baldrige & De Bord, contra.

AMES, C.

On the 26th day of April, 1899, the plaintiff in error, Palmer, was the owner of a certain store building situated in Curtis, Nebraska. On that day he made a written applica-

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tion to the defendant in error, a mutual fire insurance company incorporated in this state, for a policy of fire insurance upon that building. By the usual terms of contracts in such cases the maximum amount of premium payable by the insured was \$22.50, and one-half thereof, or \$11.25, to be paid in cash on the delivery of the policy, and the remainder in assessments as they should be demanded from time to time in accordance with the rules governing the company in the transaction of its business. In this case, as was recited in the application, the insured paid, of this to-be-advanced sum, \$5.75 in cash and agreed to pay the remaining \$5.50 within thirty days. The application and the sum paid were immediately forwarded to the home office of the company by one of its agents and on the 29th day of April, a policy of insurance pursuant thereto was delivered to Palmer together with a memorandum subscribed by the company and saying:

"In accordance with the terms of your contract the cash payment of 50 per cent. of the premium must be made as specified below, and if such payment is not made by that date the policy will become suspended and so remain until paid; * * * cash payment \$11.25 will be due in thirty days less amount paid \$5.75, balance due \$5.50."

The policy also contained a stipulation that "this company shall not be liable for any loss or damage under this policy if the cash payment shall be due and not paid, nor for any loss or damage occurring at any time when any assessment or part thereof shall be due and unpaid." The remaining \$5.50 was never paid and the building was destroyed by fire May 30, 1899. This action was brought upon the policy of insurance, and the court, upon the disclosure in evidence of the foregoing facts, instructed the jury to return a verdict for the defendant. The plaintiff brings the case here by petition in error, which he supports by the single contention that the unpaid \$5.50 was not a cash payment or to be treated or regarded as such, but a deferred payment, and that the

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policy contains no forfeiture clause for delinquency in making a deferred payment, and that the contract was therefore in force at the time of the loss. We look upon this criticism as being purely verbal. The contract contemplated two kinds of payments only: one of a stipulated sum and the other of assessments. The stipulated sum is called in the policy a cash payment. Instead of demanding the whole of it upon the delivery of the policy, the company forebore so doing, as to a part of it, for the term of thirty days, expressly notifying the insured that the forfeiture clause of the contract would become effective if payment should not be made on or before that date. But this action did not convert the stipulated cash premium into a deferred premium, and the plaintiff accepted his policy with full knowledge of all its terms and conditions. All that the transaction amounted to was that the company waived, for a definite period, the payment of a specified portion of the cash premium, but neither expressly nor by implication did it waive anything else or incorporate any new covenant into its contract. We think the instruction given by the trial court was not erroneous, and it is recommended that the judgment be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

NELS MATHIESON V. OMAHA STREET RAILWAY COMPANY.

FILED DECEMBER 3, 1902. No. 12,359.

Commissioner's opinion. Department No. 3.

1. **Witnesses: EXPERT: EVIDENCE: RAPIDITY OF MOTION.** A witness need not be an expert in order to be permitted to give his opinion of the rapidity of motion of familiar objects like railway trains and street cars, but he must be shown to have had, and to have availed himself of, an opportunity for observation in the case in hand.

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2. Evidence: ORDINANCE REGULATING SPEED OF ELECTRIC CARS: MATERIALITY: PERSONAL INJURIES. An ordinance regulating the speed of electric street cars is immaterial in a case in which it is not shown at what rate of speed a car, alleged to have caused an injury, was, in fact, at the time moving.

ERROR from the district court for Douglas county. Tried below before BAXTER, J. *Affirmed.*

Weaver & Giller and Frank T. Ransom, for plaintiff in error.

John L. Webster, contra.

AMES, C.

The defendant in error is a street railway company operating a line of electric street railroad traversing Leavenworth street in the city of Omaha. At about 11 o'clock of a certain night the plaintiff, who was traveling along Twentieth street, which intersects Leavenworth street at right angles, approached the defendant's tracks with a team of horses hitched to a wagon in which he was riding. When the forefeet of the horses were at or on the outer rail of the track, the plaintiff discovered the headlight of an approaching car. He immediately whipped up his horses and drove them across the track, but the advancing car caught the hind wheels of his wagon, causing injuries on account of which this action was brought. If the defendant was negligent it was because of its conduct in one or the other of two particulars, or by reason of concurring misconduct in both respects: First, because of failure of the motorman, in view of a threatened collision, to stop the car in due time before it came in contact with the wagon. There is no evidence in the record, or at least counsel have called our attention to none, indicative of such a failure or indeed tending to prove that the defendant's servants knew of the presence of the team and wagon until the collision took place. Second, because the defendant was at the time operating its car at an excessive and negligent rate of speed. Upon

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this point there is also an absence of substantial evidence. The plaintiff testified, as already noted, that he did not observe the approaching car until his team was already upon the outer rail of the track, and that he then became much excited because of the threatening circumstances and attempted to drive his team over the tracks; that in order to accomplish this object it was necessary to advance a distance of only twenty-one feet, and that he urged his horses to a speed of five or six miles an hour, and that before he could clear the way, and, as it seems to him, within two seconds after he first saw the headlight, the collision took place. He estimates, or attempts to do so, that the car, when he first saw it, was about two hundred or two hundred and fifty feet from the crossing, but he did not compare its position, at the time, with neighboring buildings or with any other fixed landmark, and evidently had, in the excitement of the moment, no opportunity for so doing. He seems to have seen nothing but the headlight, which, as it was moving towards him in a nearly direct line, afforded him no means of measuring a distance which, because of the suddenness of the impact with his wagon, was presumably much less than he conjectured. It is at least quite as reasonable to suppose that the almost immediate collision was due to a short interval between the two vehicles, as that it was due to the rapid motion of the car. Plainly either supposition is a mere guess not rising to the dignity of evidence. In this state of the record the plaintiff offered to prove by his own testimony what was the rate of speed at which the car was running. The court excluded the evidence, we think rightfully, upon the ground that the competency of the witness had not been shown. It is conceded that a witness need not be an expert in order to be permitted to give his opinion of the rapidity of motion of familiar objects like railway trains and street cars, but he must be shown to have had, and to have availed himself of, an opportunity for observation in the case in hand. This the plaintiff not only did not

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do, but his own account of the transaction pretty clearly established the contrary. There was no other evidence offered or introduced upon the point. An ordinance of the city of Omaha regulating the rate of speed of the defendant's cars at the place in question was offered and excluded, but of course, in the absence of evidence that the speed employed was greater than that prescribed, the regulation was immaterial. The plaintiff also testified what in his opinion was the length of time consumed by his team and wagon in crossing the track, in order that by comparing the distances it might be ascertained how rapidly the car was moving if it was 200 or 250 feet away when the plaintiff's attempt at crossing was begun; but, as we have noted, one of the essential elements of this problem, to wit, the distance of the car from the crossing, is not proved, and hence there is an absence of an indispensable *datum* for the making of such a calculation.

At the close of the trial the court instructed the jury to return a verdict for the defendant and rendered a judgment accordingly. There was clearly an insufficiency of evidence of negligence on the part of the defendant, and we are, therefore, not called upon to decide whether or not there was evidence of negligence by the plaintiff also.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

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NELS MATHIESON V. OMAHA STREET RAILWAY COMPANY.

FILED OCTOBER 21, 1903. No. 12,359.

Commissioner's opinion. Department No. 1.

1. **Negligence: STREET RAILWAYS: INDIVIDUALS: DEGREE OF CARE.** Electric street railway companies and ordinary travelers upon the thoroughfares of a city, are obligated to observe equal degrees of care to avoid accidents. Neither have a right of way superior to that of the others. *Omaha Street Railway Co. v. Cameron*, 43 Neb., 297, followed.
2. **Negligence: PRIMARY AND CONTRIBUTORY: QUESTIONS OF FACT.** Issues, both of primary and of contributory negligence, are ordinarily questions of fact for a jury.
3. **Negligence: EVIDENCE: ORDINANCE REGULATING SPEED OF ELECTRIC CARS: PERSONAL INJURIES.** When in an action against a street railway company for damages resulting from a collision with a private vehicle, the rate of speed of a railway car is material to the controversy, and there is evidence from which it may be ascertained, a city ordinance regulating such speed is competent evidence as bearing upon the question of negligence.
4. **Witnesses: EVIDENCE: RAPIDITY OF MOTION: NON-EXPERT: COMPETENCY.** A non-expert who can testify to the rate of speed of a street railway car, only as the result of a mathematical calculation made after the event, is not a competent witness on the subject.

REHEARING of case reported *ante*, page 743.

ERROR from the district court for Douglas county. Tried below before BAXTER, J. *Judgment below reversed.*

Weaver & Giller and *Frank T. Ransom*, for plaintiff in error.

John L. Webster, contra.

AMES, C.

This is a rehearing from a decision in the same case at a former term of the court, reported *ante*, page 743, and in 92 N. W. Rep., 639. The argument, which was far more thorough and exhaustive than that at the former hearing,

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has convinced us that the previous decision is erroneous. It is unnecessary to repeat the recitation of facts contained in the former opinion, but it should be supplemented by reference to an important circumstance which we overlooked, or to which we did not give due weight, at the time of its preparation. At the point where the plaintiff attempted to cross the railway there was, upon the side of the street from which the car was approaching, a church building occupying a city lot. To the longer side of this lot the street occupied by the railway tracks is adjacent, and immediately beyond the lot there is an alley. Still further away, and from a hundred and fifty to two hundred feet from the scene of the accident, is a building called "the flats." The plaintiff testified that when he first saw the approaching car it was opposite or alongside this latter mentioned building, but admitted that he did not see the structure. It is possible, however, that he was able to judge of the relative positions of the building and of the car because of his knowledge of the existence of the former and of its position relative to other objects in their neighborhood and between it and himself, and we have concurred in the opinion that whether he was so or not is a question of fact affecting the weight and credibility of his testimony, which is within the province of the jury to decide. Obviously the position of the car, if it can be ascertained, at or immediately before the time when the plaintiff reached the crossing, has an important bearing upon the issues both of primary and of contributory negligence, which are, also, ordinarily questions of fact for the jury.

It is evident, from the circumstances of the accident as detailed by the plaintiff himself, that he formed no judgment at the time and made no observation enabling him so to do concerning the speed of the car, but he was asked as a witness whether he could now tell the rate of its motion. Objection was made and sustained to his competency to testify upon this point. It is plain that he could, at the time of the trial, have had no opinion on this matter ex-

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cept such as was drawn by inference or calculation from a knowledge of the relative positions of the two vehicles and the speed at which his own was moving. This is an inference neither calling for the opinion of an expert nor one which the plaintiff had greater opportunities for correctly making than had the jury, and as it was a subject peculiarly within their province, we are of opinion that the objection was properly sustained.

Consistently with the conclusion at which we have now arrived, viz., that the testimony of the plaintiff furnished data from which the jury might have ascertained, by calculation, the speed of the car, the reason given in the former opinion for upholding the ruling of the district court excluding the city ordinance from evidence no longer applies. The admissibility of the ordinance, under such circumstances, is conclusively established by the decision of this court in *Omaha Street Railway Co. v. Duvall*, 40 Neb., 29.

With respect to another matter much discussed in the argument, we think this court has already impliedly, if not expressly, adopted the principle, which seems to us to be just and reasonable, that an electric street railway company and an ordinary traveler upon the thoroughfares of a city are obligated to observe equal degrees of care to avoid accidents. *Omaha Street Railway Co. v. Cameron*, 43 Neb., 297. Neither has a right of way superior to that of the other.

For the foregoing reasons it is recommended that the former decision of this court be vacated and set aside and that the judgment of the district court be reversed and a new trial granted.

HASTINGS and OLDHAM, CC., concur.

JUDGMENT BELOW REVERSED.

CHARLES F. IDDINGS, APPELLANT, V. CITIZENS' STATE BANK
OF COUNCIL BLUFFS, IOWA, APPELLEE, ET AL.

FILED DECEMBER 3, 1902. No. 12,373.

92 NW 578
Commissioner's opinion. Department No. 2.

Judgment: TORT-FEASOR, AGAINST: SETTLEMENT WITH THIRD PERSON.
A judgment against a tort-feasor is not satisfied by a settlement with a third person, in no way a joint wrong-doer with the judgment debtor, and not shown to have been liable.

APPEAL from the district court for Lincoln county.
Tried below before GRIMES, J. *Affirmed.*

Wilcox & Halligan, for appellant.

Harl & McCabe and *T. C. Patterson*, contra.

POUND, C.

The Brown Bros. Grain Company was indebted to the defendant, the Citizens' State Bank, and by way of collateral security deposited from time to time bills of lading of cars of grain shipped to them. Certain cars, covered by bills of lading held by the bank, were seized by the plaintiff under a "special writ of attachment," a proceeding under the Iowa practice somewhat like an action in replevin, and the grain so taken was disposed of and the proceeds were converted to plaintiff's own use. Afterwards the bank recovered a judgment of over \$1,000 against the plaintiff for the value of this grain. It appeared that the railway company had been in the habit of turning over the cars to the grain company without the bills of lading, and that a number of cars called for by the instruments held by the bank were missing when the grain company became insolvent. Accordingly the bank brought suit against the railway company for the value of the grain improperly delivered to the Brown Bros. Grain Company and for certain overcharges. In

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this suit in some way the cars converted by Iddings and recovered for in the judgment against him were included. A settlement was entered into between the bank and the receivers of the railway company, in which some \$80 were paid to the bank in discharge of its claim as to the grain converted by Iddings. Thereupon the latter brought this suit to enjoin collection of the judgment against him on the ground that the claim had been satisfied. The lower court ordered the \$80 paid by the railway company applied upon the judgment and dismissed the suit.

We need not examine the several questions as to the findings of the trial court urged by counsel for the reason that we are satisfied there is no merit in the plaintiff's case. It is evident that the cars seized by Iddings were included in the proceedings against the railway company by mistake and oversight, and there is a conflict in the evidence as to whether these items were included in the final settlement. But if we assume that they were and that the bank knowingly and intentionally took \$80 from the railway company by reason of a supposed claim as to these cars, it would not have the effect of satisfying the judgment for over \$1,000 against Iddings. Iddings and the railway company were not joint wrong-doers in any sense. The railway company was an entire stranger to the transaction by virtue of which Iddings became liable, nor was it liable to the bank for any sum as to the cars seized and disposed of in the special attachment proceedings. It is well settled that a cause of action against a tort-feasor is not satisfied by a settlement with a third person, in no way a joint wrong-doer with the judgment debtor, and not shown to have been liable. *Atlantic Dock Co. v. Mayor*, 53 N. Y., 64; *Turner v. Hitchcock*, 20 Ia., 310; *Wagner v. Stock Yards & Transit Co.*, 41 Ill. App., 408; *Thomas v. Central R. Co.*, 194 Pa. St., 511, 45 Atl. Rep., 344. As this court said in *Wardell v. McConnell*, 25 Neb., 558, "the discharge of a party not shown to be a joint wrong-doer will not operate as a discharge of the other defendants." How much the less, then,

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would the settlement with such a third person affect a judgment already recovered?

We recommend that the decree be affirmed.

AFFIRMED.

CHARLES M. JAKES V. WINCHESTER J. DAWES.

FILED DECEMBER 3, 1902. No. 12,388.

Commissioner's opinion. Department No. 1.

1. **Sales: PLEADING EVIDENCE.** A petition in an action to recover the value of corn which sets forth the correspondence between the parties may be open to the charge of pleading evidence, but if the correspondence discloses that the price and terms of payment were communicated to the prospective seller though no particular corn was mentioned, the petition is not, on account of such omission, objectionable as failing to state a cause of action if it also alleges the delivery of the corn.
2. **Execution: SALES: CROPS, RIGHT TO.** A purchaser of land at execution sale is entitled to all crops planted thereon after confirmation.
3. **Sales: INTERPLEADER: STATUTES.** One who has purchased corn relying upon the title of the seller, but who is later advised of the claims of a third party, may protect himself in the event of suit on behalf of either claimant by filing an affidavit in the nature of a bill of interpleader provided for by section 48 of the Code.

ERROR from the district court for Lancaster county.
Tried below before **FROST, J.** *Affirmed.*

Geo. A. Adams and Thos. Darnall, for plaintiff in error.

Robert Ryan, contra.

LOBINGIER, C.

This is an action to recover the value of certain corn raised on land purchased by defendant in error at execution sale on April 14, 1900. The sale was confirmed on May 12, following, and the order of confirmation contained also a direction to the sheriff to place the purchaser in possession. The sheriff's deed was issued on

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May 17, and recorded on June 1. The tenant of the execution debtor and former owner continued in possession after this change of title, and while there is no direct evidence that he attorned to defendant in error, he seems to have recognized that the latter was entitled to the landlord's share of the crop and to have harvested and marketed the same as defendant in error's agent. When the corn was ready for marketing, the latter wrote to the agent in charge of plaintiff in error's grain elevator at Berks, Nebraska, inquiring as to the price paid for corn and the terms of payment. After receiving a reply containing the desired information, defendant in error again wrote stating that he would have the corn delivered at the elevator by the tenant, and requesting payment in accordance with the terms furnished by the agent. While delivery was in progress, and before it was quite completed, the agent in charge of the elevator wrote to defendant in error stating that the execution debtor and former owner of the land claimed the corn for rent due him, and subsequently the agent paid for the corn to S. R. Foss, who claims as a purchaser from the execution debtor. Defendant in error then brought this action against both Foss and the owner of the elevator. No question was raised as to the authority of the one in charge of the elevator, but a demurrer was filed by Foss, which was sustained, and the case proceeded against plaintiff in error alone. There was a trial to the court, a jury being waived, and judgment was rendered against defendant, who now brings this proceeding.

The principal error argued in the brief is that the petition does not state facts sufficient to constitute a cause of action, and the claim is made that it fails to show a contract for the purchase of any particular corn. The petition set forth *in extenso* the correspondence, and might, therefore, have been open to the charge of pleading evidence. Moreover, it is true, as claimed, that the correspondence itself does not show a contract, but merely preliminary negotiations, and some of it probably con-

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stitutes redundant matter in the petition. It does, however, disclose that the prices and terms of payment were made known to the prospective seller, and this is followed up by an allegation of delivery of the subject-matter, so that we think the petition sufficiently sets forth a contract of sale.

Plaintiff in error's main contention, however, is that the title to the corn was in the execution debtor or the purchaser from him and never passed to defendant in error. But the cases relied on lend no support to this contention. *Monday v. O'Neil*, 44 Neb., 724, was a controversy between a purchaser at foreclosure sale and a tenant who had planted a crop after the rendition of the decree but before the sale. At the time of confirmation the crop was, perhaps, half grown, and the court, applying the common-law doctrine of emblements in the case of an estate of uncertain duration, held that the tenant and not the purchaser was entitled to the crop. There is no contest here between the purchaser and tenant; and, so far as the latter figures in the case at all, he does so as the purchaser's agent. Moreover, the crop was not planted at the time of the sale. The tenant testifies that he began planting on May 12, the day of confirmation, but that the portion planted on that day was all washed out, so that practically the entire crop was planted after confirmation, and the execution debtor was not entitled to claim any part of it. As was said in *Parker v. Storts*, 15 Ohio St., 351: "A purchaser of lands at judicial sale, where the proceedings are legal and regular, and no ground exists for setting aside the sale, becomes, by his purchase, and by the payment of the purchase money, or compliance with the terms of sale, the equitable owner of the premises; and though he may not be invested with the legal title till the confirmation of the sale, and the execution of a conveyance by the proper officer, pursuant to the order of the court; yet, when the legal title is thus vested, for many purposes it relates back to the day of sale. The execution debtor in such case, though in rightful posses-

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sion of the premises, has no right, after the sale, without the assent, express or implied, of the purchaser, to deprive him of the use and enjoyment of the premises, and prolong his own possession, by sowing, on his own account, crops which may not mature or be harvested for many months after the confirmation of sale, and conveyance of the legal title." It follows from this that the time of the issuance and recording of the sheriff's deed is immaterial, as is also the stipulation introduced in evidence reciting that defendant in error was not placed in possession nor the tenant dispossessed until October 1. The rights of the execution debtor and his purchaser are the only ones urged here, and these were terminated by the confirmation of the sale.

Plaintiff in error complains that he ought not to be compelled to pay twice for the corn. He should have thought of this before he paid Foss, for he then had full notice of the claims of defendant in error. Had he been in doubt as to who was the real owner of the corn, he might have protected himself, even in case of suit, by filing an affidavit in the nature of a bill of interpleader provided for by section 48 of the Code. The rightful claimant to the corn can not be permitted to lose it because plaintiff in error, through mistake or otherwise, paid the purchase price to the wrong party.

It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

Reiss v. Argubright.

CHRISTOPHER G. REISS V. GEORGE W. ARGUBRIGHT.

FILED DECEMBER 17, 1902. No. 11,069.

92 NW 958
Commissioner's opinion. Department No. 2.

1. Pleading: GENERAL DENIAL: FORM. An answer that the defendant "states and alleges that he denies each and every allegation" of the petition is a sufficient general denial, though not in commendable form.
2. Chattel Mortgages: ORAL: VALIDITY. An oral chattel mortgage is good as between the parties thereto; it is invalid only as to creditors and subsequent purchasers in good faith.
3. Chattel Mortgages: ORAL: VALIDITY: "CREDITOR," MEANING OF. Creditor in this connection means judgment, execution or attachment creditor; a subsequent mortgagee with notice is not so regarded.

ERROR from the district court for Lancaster county.
Tried below before HOLMES, J. *Affirmed.*

Willard E. Stewart, for plaintiff in error.

Frank J. Kelley, contra.

POUND, C.

As there is no bill of exceptions, the greater number of the errors assigned are not reviewable. Objection is made to the answer in that defendant "states and alleges that he denies each and every allegation" of the petition, instead of denying them directly. This form of answer is not commendable, but it is a sufficient general denial. *Moen v. Eldred*, 22 Minn., 538; *Wadleigh v. The Marathon County Bank*, 58 Wis., 546, 17 N. W. Rep., 314.

The petition alleges that plaintiff is entitled to the immediate possession of the property in dispute under a chattel mortgage made by Mary Britt and T. F. Britt. The court in its instructions said that plaintiff claimed under a mortgage made by Mary Britt. In the absence of a bill of exceptions, we can not say that this was erro-

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neous or prejudicial. If the mortgage was given by Mary Britt as owner and T. F. Britt was a mere nominal party, plaintiff's case was fairly stated. There is nothing to indicate that such was not the case.

Another instruction is objected to because it uses the word "parties" in two senses in the same paragraph, in one case referring to the parties in the suit, in the other to the parties to an instrument. There is no difficulty in understanding what is meant, and we see no reason to suppose that any juror was misled. We must presume that jurors are possessed of ordinary intelligence.

Two other instructions explain the nature and effect of an oral chattel mortgage. It is contended that there can be no such thing under our statute, and that if there could, as the plaintiff claimed under a written mortgage, disclosed in his pleadings, the oral mortgage would be invalid as to him. These questions have been decided repeatedly. An oral chattel mortgage is good as between the parties thereto and others having notice thereof; it is invalid only as to creditors and subsequent purchasers in good faith. *Conchman v. Wright*, 8 Neb., 1, 4; *Sparks v. Wilson*, 22 Neb., 112, 114. Creditor in this connection means judgment, execution or attachment creditor; a subsequent mortgagee with notice is not so regarded. *Earle v. Burch*, 21 Neb., 702; *Farmers & Merchants Bank v. Anthony*, 39 Neb., at page 347. The instructions as abstract propositions are correct. Whether they were proper under the evidence we have no means of discovering.

We recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

Bankers' Building & Loan Ass'n v. Thomas.

**BANKERS' BUILDING & LOAN ASSOCIATION, APPELLEE. v.
DAVID A. THOMAS ET AL., APPELLANTS, ET AL.**

FILED DECEMBER 17, 1902. No. 11,771.

Commissioner's opinion. Department No. 1.

Mortgages: FORECLOSURE: PARTIES: DISCLAIMER OF INTEREST IN PROPERTY: OBJECTIONS TO DECREE: ESTOPPEL. A disclaimer of all interest in mortgaged property prevents any right to object to a foreclosure decree, which establishes no personal liability against the answering parties.

APPEAL from the district court for Douglas county.
Tried below before DICKINSON, J. *Affirmed.*

Chas. Battelle and James H. Macomber, for appellants.

Thomas D. Crane, contra.

HASTINGS, C.

This is a suit to foreclose a building and loan association mortgage. In May, 1895, plaintiff issued twenty shares of stock to defendant, D. A. Thomas, and took an assignment of it and a mortgage on an undivided one-sixth of a lot in Griffin & Smith's addition to Omaha to secure compliance with the terms of a bond for \$2,000 of the same date. The issuance of the stock, assignment, bond and mortgage are not claimed to have been in any way in violation of the approved constitution and by-laws of the plaintiff association. The defendant Thomas, however, answered, first, denying generally; second, admitting plaintiff's organization by virtue of the state law, and the execution of the bond and mortgage; third, alleging that plaintiff by its own showing charged and received greater interest than the laws of Nebraska allow and that the bond and mortgage were usurious; and, fourth, that the defendant signed the instruments as an accommodation, got no consideration, had no interest in the mortgaged property, and was "a go-between." During

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the hearing of the case, apparently, Thomas was allowed to amend this answer by setting out that the American National Bank solicited him, with plaintiff's knowledge and consent, to execute the application, bond, and mortgage; that he had no interest in it,—never in fact became a member of the association, paid no interest, dues, nor fines, and that the rate of interest amounts to more than ten per cent. per annum, and is usurious. The following answer was put in by the defendants: "Comes now the American National Bank and Union National Bank and each answering for itself states that they each join in the amended answer of said Thomas and allege the same facts in answer aforesaid and join in prayer thereof." The reply was a general denial. The district court rendered a decree for the amount computed by the plaintiff's secretary as due on the bond and the answering defendants appeal.

Two contentions are made by them in this court: first, that the allegations and proof show that Thomas was not an association member, and the transaction, not being protected by our building and loan association statute, was consequently usurious; second, that no proof was introduced to show that no proceedings had been taken at law to recover the indebtedness on the bond and that Thomas' denial raised this issue. Taking up the latter first, it is conceded that no such proof was made at the trial. It is urged, however, that none was necessary; that the execution of the securities was admitted and the fact alleged that Thomas had no interest in either the property or the transaction, and that this is the only affirmative allegation by anyone except that it is charged that the dues, fines and interest added make more than ten per cent. per annum on the loan and therefore it is usurious. The decree in this case makes no finding of any amount as due from any one. It only finds an amount due on the bond and that the sum found is a lien upon the mortgaged premises. This decree would furnish no basis for any deficiency claim against anyone. No one, then, except

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one who is claiming an interest in the mortgaged premises could complain of it. *Myers v. Mahoney*, 43 Neb., 208, 61 N. W. Rep., 580. There is no such defendant in this case. If there was error in decreeing a foreclosure without proof of the absence of previous legal proceedings, it was without prejudice to any defendant so far as this record discloses.

The same reasons apply to the claim of usury made by appellants. Nothing being asked of them personally, and they denying all claim of right in the mortgaged premises, they will not be heard to say that the decree contains usury. The defense, however, is untenable upon the face of their own statements and the proof. They neither plead nor prove any infringement on the building and loan association statute. They attempt to avoid the effect of that statute by a showing that the American National Bank borrowed the money, conveyed the property to its janitor, so that he could execute the mortgage, and employed him as a dummy throughout the transaction.

Defendants rely upon the fact that Thomas Kimball, president of the bank, was active in this transaction and was at the time treasurer of plaintiff association. This does not help them. The testimony shows that the secretary was manager of the association and had no knowledge at the time of this arrangement. The knowledge of the treasurer at the very time he was getting money of the association for his bank in known violation of the association's laws and through a fictitious owner of property, was not knowledge or notice on the part of the association. *Koehler v. Dodge*, 31 Neb., 328, 47 N. W. Rep., 913; *Buffalo County National Bank v. Sharpe*, 40 Neb., 123, 58 N. W. Rep., 734.

What is the relation of the Union National Bank to the transaction or to the mortgaged property does not appear except by the general allegation in the petition as to all the defendants except Thomas, that they claim an interest in the property. The other defendants do not answer at all.

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As defendant Thomas disclaims all interest in the property or transactions, and the American National Bank and the Union National Bank simply attempt to adopt his allegations, and there is no finding in the decree of a personal liability against anyone, it is recommended that the decree of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

PATRICIA K. BOURKE, APPELLEE, v. PHILIP SOMMERS,
APPELLANT, ET AL.

FILED DECEMBER 17, 1902. No. 11,960.

Commissioner's opinion. Department No. 1.

1. **Mortgages: FORECLOSURE: APPRAISAL: OBJECTIONS: WHEN MADE.** All objections to the appraisal of property, to be available, must be made before the sale.
2. **Mortgages: FORECLOSURE: NOTICE OF SALE: STATEMENT OF AMOUNT OF DECREE.** In a notice of sale of real estate under a decree of foreclosure, while it is proper to state the amount of the decree, such statement is not essential to the validity of the notice. *Stratton v. Reisdorph*, 35 Neb., 314, followed.
3. **Newspapers: PROOF OF: AFFIDAVIT OF PUBLISHER.** In the absence of a showing to the contrary the affidavit of the publisher, that the newspaper was one of general circulation in the county, is sufficient to establish the fact that the newspaper was a legal newspaper.

APPEAL from the district court for Buffalo county.
Tried below before SULLIVAN, J. *Affirmed.*

B. O. Hostetler, for appellant.

Francis A. Brogan, contra.

DAY, C.

This is an appeal from an order confirming a sale of real estate made pursuant to a decree of foreclosure. A number of objections to the confirmation related to alleged

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irregularities in making the appraisement, but as they were not made until after the sale they are, under the rule announced by this court, unavailing. In *Dovey v. McCullough*, 60 Neb., 376, it is held that "all objections to the appraisement of property, to be available, must be made before the sale." *Kearney Land & Investment Co. v. Aspinwall*, 45 Neb., 601; *Mills v. Hamer*, 55 Neb., at page 446; *Best v. Zutavern*, 53 Neb., 619.

It is also urged that the confirmation should have been denied because the notice of sale did not contain a statement of the amount of the decree in money. This precise question was before this court in *Stratton v. Reisdorph*, 35 Neb., 314, wherein it was said: "In a notice of sale of real estate under a decree of foreclosure, while it is proper to state the amount of the decree, such statement is not essential to the validity of the notice." No good reason is advanced why the rule as formerly announced should not be adhered to. There is no requirement in the statute that the notice of sale shall contain a statement of the amount found due by the decree. That is a matter of public record available to all persons. The amount of the decree is a matter in which a prospective purchaser is in no manner interested, since the amount of the bid need have no relation to the amount of the decree.

It is also urged that there is "no proof that the notice of sale was published in a newspaper having the legal requirements as to publication, circulation and length of publication." The decree in this case orders the land to be sold as upon execution. Section 497 of the Code provides: "Lands and tenements, taken in execution, shall not be sold until the officer cause public notice of the time and place of sale to be given, for at least thirty days before the day of sale, by advertisement in some newspaper printed in the county, or, in case no newspaper be printed in the county, in some newspaper in general circulation therein. * * * All sales made without such advertisement shall be set aside, on motion, by the court to which the execution is returnable." The

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affidavit of the publisher of the paper in which the notice was published shows that the paper was a semi-weekly newspaper published in Buffalo county and of general circulation therein. The affidavit also shows that the notice of sale was published the requisite length of time as prescribed by the statute in such cases. There is no showing tending to contradict the facts set out in the affidavit of the publisher. In the absence of a sufficient showing to the contrary the affidavit of the publisher that the newspaper was one of general circulation in the county, must be held sufficient to establish the fact that the newspaper was a legal newspaper. *Hanscom v. Meyer*, 60 Neb., 68.

The objection is also argued that the appraisement was too low. This objection to be availing should have been made before the sale. So far as the record shows this objection is urged for the first time to the confirmation of the sale.

We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

JOHN TODD ET AL., APPELLANTS, V. THE CITY OF YORK ET AL., APPELLEES.

FILED DECEMBER 17, 1902. No. 12,173.

Commissioner's opinion. Department No. 1.

1. **Waters and Water Courses: POLLUTION OF STREAM: NUISANCE: INJUNCTION.** Where one discharges refuse or sewerage into a running stream, in such quantities and in such a manner that the waters therein become foul, polluted and contaminated, emitting noxious gases and odors, and thereby endangering the health and enjoyment of those living along the banks of such stream, interfering with the proper and customary use of their property, equity has power to restrain the acts from which such consequences flow.
2. **Appeal and Error: EVIDENCE: CONFLICTING.** Where the evidence is conflicting, and there is sufficient to support the finding of the trial court, the judgment will be affirmed.

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APPEAL from the district court for York county. Tried below before SOENBORGER, J. *Affirmed.*

Merton Meeker, Bates & Kirkpatrick and Geo. B. France, for appellants.

W. W. Wyckoff, Gilbert Bros. and F. C. Power, contra.

KIRKPATRICK, C.

This is a suit brought by John Todd and others, appellants, against the city of York and its officers. The petition alleges that appellants are the owners in fee of certain lands, describing them, situated near and in a southeasterly direction from the city of York; that Beaver creek is a stream of about ten feet in width and six inches in depth, running in a southeasterly direction through York county and into Seward county; that growth of timber and shade trees extend along the banks of the stream across and along the lands of appellants; that said lands are well adapted to pasturing, growing and raising cattle, horses, and all kinds of live stock; that appellants have been at great expense in fencing and seeding their lands along, upon and adjacent to said stream to render their lands available for stock feeding and dairy purposes; that the waters of Beaver creek as they flow through the lands of appellants are clear, pure and wholesome and fit to be used, and are used largely by appellants for watering stock and for other domestic purposes; that the city of York is a city of about five thousand people; that said city has constructed a system of sewers, and has been and is about to empty the sewerage from its system into Beaver creek at a point about thirteen rods above the land of appellant Todd, the lands of the other appellants lying immediately down the creek from Todd's premises; that the water of Beaver creek below where the sewer system of the city empties therein is now, and will continue to be, on account of said sewer-

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age, foul and unfit to be used, for farming, dairy, domestic or stock-raising purposes, and does and will continue to emit unwholesome and unhealthy gases and stenches, which will disturb and interfere with the health and enjoyment of appellants and their families, and will become injurious and dangerous to the health and lives of appellants and their families, who reside on and near the creek below the mouth of said sewer; that all the acts of the city and its officers done and performed in the construction and maintenance of said sewer were done without the consent of appellants or any of them; that the injuries which will flow from the acts of the city and its officers will be continuous to appellants, and become greater from year to year; that appellants' damages can not be computed in money, and that they have no adequate remedy at law. The petition concluded with a prayer for a perpetual injunction against the city and its officers.

To this petition the city of York filed an answer, admitting its corporate character, and that it was a city of more than five thousand people, and that it had constructed a sewer system, describing the same in detail; alleging that Beaver creek ran through a portion of the limits of the city in a southeasterly direction; that the point where the sewer emptied into Beaver creek was about 1,300 feet from the point where the creek left the city limits; that a right of way for the sewer had been duly purchased by the city to the point where it emptied into the creek; that the city of York was situated on lands sloping towards and naturally drained by Beaver creek; that on account of the conformation of the ground and the surrounding country it was impossible to construct drains or sewers in any other direction, but that it was necessary that they have an outlet into Beaver creek; that it was necessary to the health and cleanliness of the city and its people that the sewer be constructed; that it was constructed with due care and with the least possible injury; that the city had constructed a system of flush

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tanks in the sewer, and that in every respect the sewers were well constructed; that it was not intended that said sewer system was to be used by more than one-fifth of the people of the city of York, and that the refuse now emptied into Beaver creek, or that should in the future be emptied into Beaver creek, was not of sufficient quantity to contaminate the stream or create a nuisance, or in any way injure the stream or the property of appellants. It was further alleged that immediately above the premises of appellants a large number of hog lots and cattle yards had for many years been located and maintained upon Beaver creek, and that from the nature and character of said stream, and the sluggishness of the water flow therein, the stream had always contained much impure matter and filth. To this answer by appellants was filed a reply, which for the purposes of this controversy may be considered a general denial. Trial was had which resulted in a finding and judgment for appellee and against appellants, dismissing their petition for want of equity. From this judgment the cause is brought to this court upon appeal.

The rule seems to be well settled in this state that where one befouls or pollutes the waters of a running stream, rendering the water unfit for use, thereby creating a nuisance, the continuation of the acts from which such results follow will be enjoined at the suit of the person injured. *Barton v. Union Cattle Co.*, 28 Neb., 350; *Abraham v. City of Fremont*, 54 Neb., 391. In *Lowe v. Prospect Hill Cemetery Association*, 58 Neb., 94, this court said: "A court of equity has jurisdiction to enjoin a threatened injury whenever its nature is such that it can not be adequately compensated in damages and its continuance would occasion a constantly recurring grievance." There can be no doubt that the principle applies with equal force to the actions of a city or of an individual. So in the case at bar, if the act of emptying the refuse through the sewer into Beaver creek results in discharging accumulated filth into the stream in such

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quantities that it is carried to the premises of appellants, becoming a nuisance, dangerous to health and destructive of the value of the property of the parties complaining, or if it interferes materially with the use and enjoyment of their property, and does so to such an extent that it might be said that they have been deprived of the use of their property, there can be little question that equity has power to interfere, and that an injunction would issue restraining the city from continuing the nuisance. But, as said by this court in *Abraham v. City of Fremont*, *supra*, this would be a question of fact in each recurring case.

In the case at bar the evidence is very voluminous, and it is impossible to set out in this opinion even an epitome of it. We have read and considered it all with great care. All the issues in the case were found generally and specifically for the defendant city, and while there is in many respects a sharp conflict in the testimony, we are fully convinced that there is sufficient competent testimony to support the trial court's findings; the rule being firmly established in this state by repeated decisions that such findings can not be disturbed by this court.

It is therefore recommended that the judgment of the trial court, dismissing complainants' petition and denying them any relief, be affirmed.

HASTINGS, C., concurs.

AFFIRMED.

SEDGWICK, J., not sitting.

State v. Holm.

THE STATE OF NEBRASKA, EX REL. HANS P. JOHNSON, v.
ANDREW HOLM.

FILED DECEMBER 17, 1902. No. 12,204.

Commissioner's opinion. Department No. 3.

Costs: RETAXING: DISCRETION. The discretion conferred on the courts by section 623 of the Code is not an arbitrary, but a legal one, to be exercised within the limits of legal and equitable principles. Following *Wallace v. Sheldon*, 56 Neb., 55.

ERROR from the district court for Antelope county.
Tried below before CONES, J. *Reversed with directions.*

E. D. Kilbourn, for plaintiff in error.

John A. Ehrhardt, *contra*.

ALBERT, C.

The plaintiff was duly elected treasurer of a certain school district, of which the defendant was moderator. The plaintiff tendered a bond to the defendant for approval which the defendant refused to approve. The plaintiff then brought an action in the district court for a writ of mandamus requiring the defendant to approve the bond. A hearing was had in open court and the cause taken under advisement, to be disposed of on a certain day. On the day set for its disposition the judge of the court was absent, but filed a written order allowing the writ demanded in the petition. Afterward the defendant moved to vacate this order, for the reason that it was not made in open court, and the motion was sustained. The cause was again tried and the peremptory writ allowed and the costs taxed to the defendant. Thereafter the defendant filed a motion to retax the costs. The motion was based on the ground that in his refusal to approve the bond he acted in good faith, and was prompted only by his solicitude for the welfare of the school district.

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The motion was sustained, and costs, amounting to \$40.25, taxed to the plaintiff. From the order retaxing the costs the plaintiff prosecutes error to this court.

Section 654 of the Code of Civil Procedure, relating to proceedings of this character, is as follows: "If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, * * * and costs; and a peremptory mandamus shall also be granted to him without delay." Aside from the sentence quoted, the general rule in regard to costs in this state is that they follow the judgment. *Wallace v. Sheldon*, 56 Neb., 55. Section 623 of the Code of Civil Procedure, which follows certain sections providing for the taxation of costs, is as follows: "In other actions the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable." But the discretion conferred by this section, if it applies at all to sections of this character, in regard to which specific provision has been made for the taxation of costs, is not an arbitrary discretion, but a legal one, to be exercised within the limits of legal principles. *Wallace v. Sheldon, supra*. The motives which prompted the defendant to refuse to approve the bond are immaterial. But, should we hold them material, it would seem to us that the defendant kept up the litigation beyond the limits necessary to ascertain his duty in the premises.

It is recommended that the order of the district court retaxing the costs to the plaintiff be reversed, and the cause remanded with directions to the district court to vacate such order.

AMES and DUFFIE, CC., concur.

The order of the district court retaxing the costs to the plaintiff is reversed and the cause remanded with directions to the district court to vacate such order.

REVERSED AND ORDER VACATED.

Martens v. Pittock.

JOHN D. MARTENS V. HERMAN PITTOCK.

FILED DECEMBER 17, 1902. No. 12,243.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: ISSUES IN APPELLATE COURT.** A motion to strike out a matter of defense, contained in an answer filed in the district court, for the alleged reason that it was not in issue in the county court where the cause was first tried, should be overruled where it appears that such matter was pleaded in the lower court, and is only set out more fully and in detail in the pleading to which the motion is directed.
2. **Contracts: WRITTEN: PLEADING IN REPLY: EVIDENCE: FRAUD OR MISTAKE.** Where parties have had verbal negotiations which have afterwards been reduced to writing, the written agreement will be taken to control as their final determination, and the parties will be bound thereby in the absence of fraud or mistake. But where such written agreement is pleaded in a reply as a matter of defense to the allegations contained in an answer, evidence of fraud or mistake in procuring such agreement will be received without further pleading.
3. **Contracts: WRITTEN: INSTRUCTION AS TO EFFECT.** Instruction complained of examined, and held that it was properly given.
4. **Evidence: INSTRUCTION UNDULY EMPHASIZING EVIDENCE.** An instruction which contains a correct proposition of law, but in which a particular portion of the evidence is pointed out, the attention of the jury is directed to it, and its effect is unduly emphasized, should not be given.

ERROR from the district court for Stanton county.
Tried below before GRAVES, J. *Affirmed.*

Henry M. Kidder, for plaintiff in error.

John A. Erhardt, contra.

BARNES, C.

This suit was originally commenced in the county court of Stanton county by the plaintiff in error, to recover of the defendant a balance alleged to be due him, on two certain promissory notes set forth in his petition. The defendant by his answer admitted that he executed the

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notes in question, but alleged that they were given for the rent of a certain farm; that he rented the plaintiff's farm for a period of five years from and after March 1, 1894, and gave the notes in question, among others, to pay the rent for the full rental period; that he took possession of the premises March 1, 1894; that the crops failed that year, and that plaintiff, in consideration of said fact, and of his payment of \$45, agreed to credit him \$95 on the rent for that year; that in May, 1895, they had a settlement of the rent for two years and plaintiff took one of the notes in question, to wit, the note for \$622.46 in full payment for said two years' rental, and in consideration of such settlement defendant secured the payment of the said last mentioned note by a chattel mortgage on all of the crops growing on the place for that year. It was further alleged in this original answer that in October, 1895, plaintiff and defendant had an agreement in writing in which it was provided that defendant was to give plaintiff two-thirds of all the crops growing on the place, and surrender the possession thereof to plaintiff March 1, 1896, and the plaintiff was to deliver up all of the defendant's notes. It was further alleged that in September of the year 1895, it was agreed between plaintiff and defendant that defendant was to deliver to plaintiff, and did deliver to him, 1,000 bushels of oats, 450 bushels of wheat and 1,500 bushels of corn and deliver the possession of the premises to plaintiff March 1, 1899, in settlement of the whole rent due for the two years during which he occupied said farm. This answer was not attacked by motion, but a reply was filed by the plaintiff and on the issues thus joined, and the evidence, the county court rendered judgment for the defendant. Plaintiff appealed to the district court, and the answer of the defendant was substantially the same as in the county court. In this answer, however, the defendant said nothing about the written agreement set forth in his former answer, that matter having been entirely abandoned; and in relation to the agreement made in the month of Sep-

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tember, 1895, the defendant pleaded as follows: "In the month of September, 1895, the plaintiff and defendant entered into a verbal agreement whereby defendant agreed to release all right to the premises for the balance of the term of said lease from March 1, 1896, to the 1st day of March, 1899, and deliver to the plaintiff two-thirds of all the crops grown on said premises for the year 1895, and the plaintiff agreed to deliver to defendant all rent notes executed and delivered by him for said rent. Defendant further says that he can not speak or understand the English language, and the conversation in said settlement was carried on through an interpreter in the German language, which plaintiff understood and was conversant with; and this defendant alleges that at the time said agreement was made the parties thereto fully understood that the cancellation of the balance of the term of said lease and the delivery to him of the two-thirds of all the crops growing on said premises for the year 1895, was to be in full of all the notes given for the rent of said premises; that there were grown on said premises described in said lease, and for which said notes were given in the year 1895, about 1,500 bushels of oats, 675 bushels of wheat and 2,250 bushels of corn, and in pursuance of said agreement of which amount there were delivered to the plaintiff 1,000 bushels of oats, 450 bushels of wheat and 1,500 bushels of corn, and on the 1st day of March, 1896, defendant delivered to plaintiff the possession of said leased premises." The defendant therefore prayed that he might be dismissed without day and recover his costs expended in the action. Plaintiff thereupon filed a motion to strike out all that portion of the answer relating to the agreement alleged to have been made in September, 1895, because it was claimed that it was a departure from the facts stated in the answer in the county court and raised a new issue not made by the pleadings upon the former trial. This motion was overruled, to which ruling the plaintiff excepted. He filed a reply and a trial was had to a jury which resulted in a verdict and judgment

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for the defendant, and the plaintiff now assigns the ruling of the district court upon his motion to strike, as his first ground of error herein.

1: It is contended that the court erred in overruling plaintiff's motion to strike out a portion of defendant's answer because it stated a defense not put in issue by the answer filed in the county court. We do not so understand the pleadings. The only substantial difference is, that in the answer in the district court defendant abandoned his allegation in regard to a written agreement. He pleaded the same agreement alleged to have been made in September, 1895, which was set forth in the answer in the county court. The only difference between the answers on that question is, that in the one in the district court the agreement is set forth more fully and in detail than it is in the one in the county court. The issue of fact is the same, and the motion to strike was therefore properly overruled.

2. It is next contended that the agreement or settlement was in writing, and its terms can not be changed by parol evidence. It is true, as a general proposition, that where the parties have reduced their agreement to writing it can not be changed or modified by a contemporaneous parol agreement. In this case, however, the defendant relied for his defense upon a parol agreement, and after plaintiff had introduced the notes in suit and rested his case, defendant gave his evidence as to the verbal settlement made in September, 1895, and pleaded in his answer. The plaintiff thereupon produced his rebuttal evidence and in so doing introduced a written agreement dated September 26 of that year, to which there was an appendix of October 9, 1895. The only difference between it and the verbal settlement testified to by defendant were the following words: "The said Pittock to have credit on his indebtedness for all said grain and fruit at its market value." As to this point the defendant, who could neither read, write, nor speak the English language, testified that when he signed the agreement he was told and understood

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that by giving up the lease and turning over the grain the whole debt was settled. It further appears in the evidence that he said upon signing the agreement that he was glad that the matter was all settled. This evidence is not disputed. This question was submitted to the jury under proper instructions; the finding was in favor of the defendant and a verdict was rendered for him. We are unable to say that it was clearly wrong. There was evidence to sustain it and it should not be set aside.

3. It is further contended that the court erred in giving instruction No. 3 upon its own motion. By this instruction the jury were told in substance that where parties have had verbal negotiations which have afterwards been reduced to writing, the law presumes that the entire agreement was reduced to writing and that the written agreement will be taken to control and as the final determination of the parties. The jury were further told that if they believed that the settlement between plaintiff and defendant was finally reduced to writing, as alleged in plaintiff's reply, then they were instructed that the written contract is the best evidence of such agreement and of the understanding of the parties, and in the absence of fraud or mistake the parties are bound thereby. They were also told that they should determine from all of the evidence before them whether or not the settlement was reduced to writing, and if they found the same was reduced to writing then such written contract was binding upon the parties thereto; that if they should so find then it would be their duty to determine whether or not the written contract or settlement covers the notes in controversy, and if they should find said contract does not cover the notes in controversy their verdict should be for the plaintiff, unless they should find from the evidence that after the execution of the written contract set forth in plaintiff's reply there was a separate and independent verbal settlement of the notes in controversy by and between the plaintiff and defendant as set forth in the answer. And if they should so find their verdict should

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be for the defendant. We think this instruction fairly states the law applicable to the issues raised by the pleadings, and the evidence in the case. It appears to be more favorable to the plaintiff than to the defendant, and we hold that the giving of this instruction was not reversible error.

4. It is contended by the plaintiff that the court erred in refusing to give the instruction tendered by himself, which was as follows: "You are instructed that where parties have had verbal negotiations, which have afterwards been reduced to writing, that the written agreement will control and be taken as the final determination of the parties. This rule can not be changed except in case of fraud or mistake. Fraud and mistake are never presumed, and to entitle a party to prove such a circumstance the fraud or mistake depended upon must be pleaded. In this case the evidence shows that after negotiating for a settlement for some time all parties did, on October 9, 1895, reduce their settlement to writing. Defendant Pittock does not plead fraud or mistake in the making of this written settlement or in his signature. Under this condition the defendant will be held to the terms of this written settlement." While some of the statements contained in this instruction are no doubt a correct exposition of the law, yet, taken as a whole, it is objectionable because it directs attention to, and unduly emphasizes a part of the evidence. The written settlement or written agreement, to which this instruction was directed, was set up by the plaintiff in his reply. The defendant did not rely upon it; and, so far as he had any knowledge of it, its terms were in exact accordance with the verbal settlement which he had pleaded in his answer. He was not entitled to file any other pleading to make up the issues, and he could introduce the evidence of his mistake or misunderstanding in relation to the contents of this written agreement under the issues thus formed. Instruction No. 3, given by the court, covers substantially all of the correct propositions of law set forth in the instruction asked for by the plain-

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tiff, and is not open to the objection above suggested. We think the court properly refused to give the instruction. The whole question having been submitted to the jury, and that body having returned a verdict which we are unable to say was clearly wrong, we recommend that the judgment of the district court be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

THE WESTERN LAND COMPANY, APPELLEE, v. TIMOTHY J. BUCKLEY ET AL., APPELLANTS.

FILED DECEMBER 17, 1902. No. 12,270.

Commissioner's opinion. Department No. 1.

- 1. Mortgages: FORECLOSURE: TAX LIEN: PRIORITIES: PARTIES.** The holder of a tax lien is not a necessary party to the foreclosure of a mortgage subsequent in point of time to the tax lien, where the right to foreclose the tax lien has not yet accrued.
- 2. Parties: NECESSARY AND PROPER: FAILURE TO LITIGATE RIGHTS: BAR.** A party will not be barred of his rights by the decree in an action to which he was neither a necessary nor a proper party defendant, and whose rights in such action were not litigated or in fact determined.
- 3. Taxation: FORECLOSURE OF LIEN: LIMITATION OF ACTIONS.** Under the repeated decisions of this court, a party may bring his action to foreclose a tax lien upon property at any time within five years from the end of the two years within which the owner of the property has a right to redeem from the tax sale.

APPEAL from the district court for Adams county.
Tried below before ADAMS, J. Affirmed.

Batty & Dungan, for appellants.

J. P. A. Black and L. J. Capps, contra.

KIRKPATRICK, C.

This is a suit brought by the Western Land Company, appellee, against Timothy J. Buckley and others to fore-

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close a tax lien. The land company had judgment of foreclosure in the district court, and the cause is brought to this court upon appeal by defendants below. It is disclosed by the record that on November 10, 1892, and prior thereto, M. R. Davidson was the owner of certain lots in the city of Hastings. On that day they were sold by the treasurer for delinquent taxes, Western Land Company, appellee, being the purchaser. On the 2d day of August, 1893, there was executed a mortgage on the lots so purchased by appellee, which was subsequently foreclosed, and to which foreclosure suit appellee and others were made parties defendant. Appellee made no appearance, and subsequently a decree of foreclosure was entered, an order of sale was issued and the property sold at sheriff's sale. The amount due upon appellee's tax lien was deducted by the sheriff upon a certificate from the county treasurer. The property was sold to Henry Brewer, mortgagee. Sale was confirmed, and thereafter Brewer conveyed the premises by warranty deed to Timothy J. Buckley, one of the appellants. Two questions are presented by the pleadings and the evidence upon the determination of which the result of this controversy must depend: first, was appellee, the Western Land Company, foreclosed and barred of its tax lien by the decree foreclosing the mortgage to which decree it was a party? and second, was the right to foreclose its tax lien barred by the statute of limitations at the time it commenced its tax foreclosure?

Upon the question whether or not the holder of a tax lien prior in point of time to the date of a mortgage being foreclosed is a necessary or proper party, we express no opinion. In this case, the tax sale was made on November 10, 1892. The mortgage foreclosure proceedings were commenced October 3, 1894, and within less than two years from the date of the certificate of tax sale. It is clear that under the statute the holder of the tax-sale certificate had no right to foreclose the same until after the expiration of the time within which the landowner had a right to redeem; and the trial court would have been

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without authority to enter a decree foreclosing the lien until after the expiration of the two years from its date. So that, under the circumstances of this case, we are of opinion that appellee, while likely a proper party, was, at all events, not a necessary party to the mortgage foreclosure proceedings. However, that question is not decisive of the question in controversy.

That portion of the petition in the mortgage foreclosure which relates to the rights of appellee is in the following language: "These plaintiffs further allege that the defendants * * * The Western Land Company, and M. R. Davidson, have or claim to have some interest in and to said property, the exact nature of which is unknown to these plaintiffs, but plaintiffs allege that whatever interest the said defendants may have are junior, subject and inferior to the lien of these plaintiffs." The prayer of the petition asked for a money judgment against the mortgagor, and "that the defendants and each of them may be foreclosed of any and all interest which they or each of them have in said mortgaged premises."

Such portions of the decree of foreclosure as are material are in the language following: "Now, on this 20th day of December, 1894, this cause comes on for hearing, and the defendants and each of them having failed to answer, plead or demur to the petition of the plaintiff, and due service having been had upon all of said defendants, the court finds that the defendants and each of them thereby admit the facts in plaintiffs' petition to be true; * * * that the equity of redemption of the said defendants and each of them be forever barred and foreclosed, and said mortgaged premises be sold."

It is clear that the rights of appellee under its tax-sale certificate were not in issue in the foreclosure case, and that the decree of the trial court can not be a bar to the foreclosure of its lien. The question presented was carefully considered by this court in *Lincoln National Bank v. Virgin*, 36 Neb., 735, and we are content with the views therein expressed. The same doctrine is announced in

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Straight v. Harris, 14 Wis., 553; *Strobe v. Downer*, 13 Wis., 11. It follows, therefore, that the first contention of appellants can not be sustained.

The question next requiring consideration is whether the right of appellee to foreclose its tax lien was barred by the statute of limitations. This suit was brought April 6, 1895, five years and five months from the date of the certificate of tax sale. It is claimed by appellants that under the provisions of section 179, chapter 77, article 1, Compiled Statutes, 1899, a suit to foreclose a tax lien must be brought within five years from the date of the certificate. It may be admitted that the section referred to will bear the construction contended for; but it is equally clear that this court, by a long line of decisions, has adopted and adhered to the rule that the foreclosure of a tax lien may be brought at any time within five years from the end of the two years within which the owner retains his right to redeem. *D'Gette v. Sheldon*, 27 Neb., 829; *Warren v. Demary*, 33 Neb., 327; *Alexander v. Thacker*, 43 Neb., 494. We are of opinion that this construction has become a rule of property in this state, and it will be adhered to. It follows that the right of appellee to foreclose its tax lien was not barred at the time it commenced its proceedings to foreclose. The judgment of the trial court seems to be right in all particulars, and it is therefore recommended that the same be affirmed.

HASTINGS, C., concurs.

AFFIRMED.

EDWARD CURRAN V. FRANK HAGEMAN ET AL.

FILED DECEMBER 17, 1902. No. 12,274.

Commissioner's opinion. Department No. 1.

1. Appeal and Error: MOTION: OVERRULING: FAILURE TO EXCEPT.

Where a motion has been sustained in part and overruled in part, the maker of it, who has taken no exceptions, cannot complain of error in its overruling.

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2. **Parties: ACTION, CAUSES OF: MISJOINDER: OBJECTIONS, WHEN MADE: WAIVER.** An objection of misjoinder of causes of action and of parties defendant, must be taken before going to trial or the objection will be deemed waived.
3. **Appeal and Error: EQUITY: REVIEW ON ERROR: MOTION FOR NEW TRIAL.** To authorize a review of errors occurring at a trial a motion for new trial is as essential in an equity as it is in a law case.
4. **Quieting Title: PLEADING: PETITION SUFFICIENT.** Petition examined, and *held* to set forth sufficient facts to show a cause of action in favor of plaintiffs/and against defendant.

ERROR from the district court for Greeley county. Tried below before MUNN, J. *Affirmed.*

J. R. Swain and J. E. Kavanaugh, for plaintiff in error.

Henry M. Mathew, *contra.*

HASTINGS, C.

This is a petition in error brought by defendant below, Edward Curran, to set aside a decree in the district court for Greeley county cancelling a sheriff's deed and quieting title as against him in defendants in error. His father, Hugh Curran, had procured an attachment on an alleged claim against the Lombard Investment Company. Service by publication was sought to be obtained against the Lombard Investment Company, a corporation organized under the laws of the state of Nebraska, and Frank Hageman, its receiver. Judgment was rendered and assigned to Edward Curran, and the 160 acres of land involved here were sold under the attachment and bought in by the latter. Subsequently the defendants in error, hereafter called plaintiffs, filed in the district court for Greeley county a petition alleging that they were the owners in fee simple and in possession of the land, and had been since January 18, 1896; that on February 25, 1896, Hugh Curran commenced attachment proceedings in said court against the Lombard Investment Company of Nebraska, claiming an indebtedness due him from the company of \$507; that he procured

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a writ of attachment and caused the same to be levied upon plaintiff's lands; that in June, 1896, he procured service by publication upon the Lombard Investment Company, a corporation organized under the laws of the state of Nebraska and Frank Hageman, its receiver; that September 15, 1896, a default was entered against the defendants, Lombard Investment Company and Frank Hageman, and judgment entered against them for \$487.42, and the lands were ordered sold; that afterwards this judgment and order of sale was assigned to Edward Curran and the latter procured that the premises be sold by the sheriff April 19, 1898, and on April 21, 1898, the sale was confirmed and the sheriff executed a deed to Curran; that this was recorded in book 17, page 320, of the deed records of Greeley county and was a cloud upon plaintiffs' title; that the Lombard Investment Company was a Kansas corporation and the plaintiffs, Hageman, Lombard and Ladd, were trustees appointed by the United States circuit court, and had accepted their trust; that the Lombard Investment Company of Kansas owed Curran nothing; that Frank Hageman was never receiver of the Lombard Investment Company of Nebraska; that Minnie Curran, defendant, was the wife of Edward Curran; that no service of summons was ever made on any of the plaintiffs or on the Lombard Investment Company of Kansas in Curran's action, and that they had no knowledge of the attachment action until after the filing of the sheriff's deed to Curran; that the proceedings of Hugh and Edward Curran were taken with full knowledge of plaintiffs' rights in the land. They asked that the sheriff's deed be canceled of record.

Motion was filed to compel the plaintiffs to make their petition more specific in setting out specifically the title which the plaintiffs claimed in the land; to set out whether the Lombard Liquidation Company, plaintiff, was authorized to hold real estate in Nebraska; to set out who the trustees were acting for; to set out a copy of the deed under which they held; to set out more fully the attach-

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ment proceedings, and, fifth, to set out a copy of the pretended publication for service of summons. A portion of this motion was sustained and the remainder overruled, but the defendants Curran and wife took no exceptions to the overruling of the part which was not sustained. The motion is therefore out of the case.

The plaintiffs amended their petition, setting out in a general way that Hageman, Lombard and Ladd as trustees held 150 acres of the land and that the Lombard Liquidation Company held ten acres. Some other changes were made in the petition and a general demurrer was filed which seems not to have been acted upon. Subsequently a demurrer for defect of parties plaintiff, for misjoinder of parties plaintiff; for misjoinder of causes of action; that several causes of action were improperly joined and that the petition did not state facts sufficient to constitute a cause of action, was filed. The last portion of this demurrer was sustained and the plaintiffs given leave to amend instantan. This appears to have been done. At all events there was subsequently filed a general demurrer to this last amended petition. From this demurrer all objections to misjoinder of parties and of causes of action are omitted. The demurrer was overruled and the defendants Curran excepted. Subsequently they filed a long answer specifically denying all of the plaintiffs' allegations except as to the attachment proceedings and the recording of the deed; alleged the latter's regularity and validity; admitted the appointment of plaintiff Hageman, as receiver, but denied knowledge of it before the sheriff's deed, and asserted that the plaintiffs had full knowledge of all the proceedings which resulted in that deed.

The allegations of the answer were denied by a reply. An application for continuance was made and overruled and the court made a general finding that there was no service whatever of summons in the attachment proceedings upon either the Lombard Investment Company of Kansas nor upon Frank Hageman, its receiver; that no

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permission was ever obtained from the United States court to sue Frank Hageman as receiver; that the judgment and order of sale in the attachment proceedings were without jurisdiction and void; that the sale was without authority and conferred no title and that the sheriff's deed had been recorded and was a cloud upon plaintiffs' title to the premises. It was ordered canceled and declared void and of no effect, and the action dismissed as to Minnie Curran. No motion for new trial was filed. It is therefore impossible to consider any of the errors arising at the trial. *Birdsall, Son & Co. v. Carter*, 11 Neb., 143; *Wells, Fargo & Co. v. Preston*, 3 Neb., 444; *Humpert v. McGavock*, 59 Neb., at page 348. This rule has the same application in equity cases as those at law. *Carlow v. Aultman & Co.*, 28 Neb., 672. The alleged error in overruling the application for a continuance can not be considered because the facts on which it was based do not appear in the bill of exceptions. *Durfee v. State*, 53 Neb., 214; *Ray v. Mason*, 6 Neb., 101. An examination of the affidavit for continuance in the transcript does not indicate any error in overruling the application. The testimony to obtain which the continuance was asked comes far short of establishing a defense.

A complaint is made because plaintiffs and causes of action were improperly joined. This complaint would quite probably be well founded if it were not for the fact that it has evidently been waived. The demurrer which was filed to the last amended petition contains no mention of this objection. Neither does the answer filed to that petition. Unless objection to a misjoinder of parties or of causes of action is taken in some form prior to going to trial, it will be deemed to have been waived. Code of Civil Procedure, section 96; *Claire v. Claire*, 10 Neb., at page 56; *Ayres v. Duggan*, 57 Neb., 750.

It remains only to consider whether or not there is a cause of action alleged in the petition. We are constrained to think that there is. Plaintiffs allege that they had title and possession of the premises prior to the in-

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auguration of the attachment proceedings; they also claim that the sheriff's deed is a cloud upon their title; they set out that there was no jurisdiction over any of the plaintiffs, or over the Lombard Investment Company, which they represent in these attachment proceedings. A cause of action for the quieting of their title against this sheriff's deed seems to be sufficiently alleged.

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

AFFIRMED.

CHARLES G. ANDERSON V. W. N. SARVER ET AL.

FILED DECEMBER 17, 1902. No. 12,275.

Commissioner's opinion. Department No. 2.

Bills and Notes: PRINCIPAL AND SURETY: SET-OFF AND COUNTER-CLAIM:
EVIDENCE: SUFFICIENT. Evidence examined, and held sufficient to sustain the judgment.

ERROR from the district court for Lancaster county.
 Tried below before FROST, J. *Affirmed.*

Talbot & Allen, R. D. McPherrin and J. S. Dittmar, for plaintiff in error.

Geo. A. Adams and F. L. Sumpter, contra.

OLDHAM, C.

This is a suit in which the plaintiff in error, who was also the plaintiff in the court below, sued the defendants on a note of \$150, on which defendant Sarver was principal and defendant Hempel was security, to recover an alleged balance due of \$110. The answer admitted the execution of the note and plead a set-off. There was a trial to a jury and verdict finding that there were due plaintiff on the note \$110 and that there were due defend-

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ant Sarver \$117.32 on the set-off, and finding a verdict for defendant Sarver in the sum of \$7.32. There was judgment on this verdict and plaintiff brings error to this court.

We have examined a voluminous record in this case and are strongly impressed with the idea that there is nothing involved in this controversy except a disputed question of fact as to the amount defendant was entitled to receive on his set-off. It appears that the verdict of the jury is supported by sufficient evidence and that every question involved was fairly presented by the instructions given by the trial court.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

LEANDER Y. KETCHUM, APPELLEE, V. HERBERT BLY, APPELLANT, ET AL.

FILED DECEMBER 17, 1902. No. 12,288.

Commissioner's opinion. Department No. 3.

Mortgages: FORECLOSURE: NO NEW QUESTION INVOLVED.

APPEAL from the district court for Sherman county. Tried below before SULLIVAN, J. *Affirmed.*

H. M. Mathew, for appellant.

T. S. Nightingale, contra.

DUFFIE, C.

This is an appeal from an order confirming a sale made under a decree of foreclosure. No questions not heretofore passed on by the court are presented. An examination of the record shows that the appraisement, adver-

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tisement and sale were fairly and legally made, and we recommend the affirmance of the order appealed from.

AMES and ALBERT, CC., concur.

AFFIRMED.

J. E. EASTON, APPELLEE, v. JAMES T. LINDEGOD, APPELLANT, IMPEADED WITH WILLIAM H. BRIMMER, APPELLEE.

FILED DECEMBER 17, 1902. No. 12,308.

Commissioner's opinion. Department No. 3.

Mortgages: FORECLOSURE: "ACTION AT LAW."

APPEAL from the district court for Dakota county. Tried below before GRAVES, J. *Reversed.*

R. E. Evans, for appellant.

Mell C. Beck, contra.

AMES, C.

This is an appeal from a decree of mortgage foreclosure. The petition is in the usual form and the answer contains a general denial. There is no evidence tending to prove that no action or proceeding at law has been begun to recover the debt to secure the payment of which the mortgage was executed.

It is recommended that the judgment be reversed and the case remanded to the district court for a new trial.

DUFFIE and ALBERT, CC., concur.

REVERSED AND REMANDED.

Cassell v. Ashley.

DAVID CASSELL, RECEIVER OF MORTGAGED PROPERTY, v.
HERB H. ASHLEY.

FILED DECEMBER 17, 1902. No. 12,321.

Commissioner's opinion. Department No. 3.

Crops: MORTGAGES: APPEAL: RECEIVER: TENANT ENTITLED TO CROPS.

Where an appeal is taken from an order of confirmation and a supersedeas granted, and a receiver of the mortgaged premises is appointed pending such appeal, a tenant of the mortgagor is entitled to the crops, growing on the mortgaged premises at the time of such appointment, as against such receiver, whether such crops are mature or not.

ERROR from the district court for Clay county. Tried below before STUBBS, J. *Affirmed.*

Thomas H. Matters, for plaintiff in error.

Wm. M. Clark and Geo. H. Hastings, contra.

ALBERT, C.

On the 2d day of June, 1899, the First National Bank of Sutton obtained a decree of foreclosure against William H. Ashley and others, on a mortgage on certain lands executed to it by Ashley and his wife. In pursuance of the decree of foreclosure the land was sold to the plaintiff in that proceeding and the sale confirmed on the 23d day of May, 1900. From the order of confirmation an appeal was taken to this court and a supersedeas bond granted. The appeal is still pending. Afterward, on the 22d day of June, 1900, on due application the court entered an order appointing David Cassell receiver of the premises, with power to collect the rents and profits, harvest and sell the crops on the premises belonging to William H. Ashley and to manage and control the premises so as to protect the improvements thereon and prevent further waste, and certain other powers not necessary to specify. It is established by the evidence that in

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the fall of 1899, after the decree of foreclosure and before the sale of the premises, the mortgagor leased the land to his son Herb H. Ashley, who then planted thereon a crop of winter wheat, which was standing on the premises at the time the order for the appointment of the receiver was entered. The receiver took possession of the crop on the 29th day of June, 1900, and harvested a portion of it, when the tenant of the mortgagor regained possession and completed the harvest. Afterward, on the 9th day of July, 1900, on the application of the receiver, the district court granted him leave to institute an action in replevin against the tenant for the possession of the wheat. The action was subsequently brought and the receiver gained possession of the wheat by virtue of the order of replevin. It was stipulated on the trial that return of the property was impossible. A verdict was given for the defendant for the value of the crop and nominal damages. Judgment accordingly. The plaintiff brings error.

We do not regard the question of the maturity of the crop, at the time of the appointment of the receiver, material. The order of confirmation was, of course, of no force pending the appeal. It may be conceded that the defendant occupies no better position in regard to the crop than his lessor, who was the mortgagor, would have occupied had he planted the crop. It may also be conceded that the receiver is in no better position than a purchaser at foreclosure sale. Whether a purchaser at such sale is entitled to the crops growing on the land, and immature at the date of sale, is a question upon which this court has never passed.

In *Foss v. Marr*, 40 Neb., 559, it was held that a mature crop of corn standing on land sold under a decree of foreclosure, and not taken into account by the appraisers, remains the property of the mortgagor who had planted and cultivated it. One point of distinction between that case and the present is that there the crop was mature; another is that it was expressly stipulated in that case that the crop was not taken into account by the appraisers.

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But we do not regard either or both of those points as decisive of the question. Under our practice, the interval between the commencement of foreclosure proceedings and their termination is sometimes measured by years. It is to the interest of the parties and of the public at large, that the lands should be cultivated. It would be contrary to reason to expect the mortgagor to sow and cultivate a crop which might pass to other hands by a sale under foreclosure, with the same skill and diligence that he would use were he sure that he would be permitted to gather it. Such crop is not, and should not be, taken into account by the appraisers, because there never can be any assurance that it will not have been matured and harvested before a sale is finally made. The supreme court of Ohio, in *Cassily v. Rhodes*, 12 Ohio, 88, and in *Houts v. Showalter*, 10 Ohio St., 124, held, in effect, that growing crops do not pass to the purchaser at judicial sale. The Ohio court recognizes that the holding in those cases is contrary to the general rule, but justifies the departure on the ground of the provisions of the statute of that state regulating judicial sales, and in the latter case says: "Under our system, frequent advertisements and offers for sale, and occasionally revaluations are necessary, before a sale can be effected. * * * It is not for the interest of any party, nor for the public interest, that the land should thenceforth lie waste; then there may have been no crops sown or planted; but when the sale comes to be made, there may be growing crops put into the ground in the meantime."

The provisions of our Code of Civil Procedure, relative to such sales, differ in no essential feature from those in force in Ohio when those cases were decided. In *Monday v. O'Neil*, 44 Neb., 724, this court quotes the foregoing language, taken from the opinion of the Ohio court, with approval and holds that it is peculiarly applicable under our procedure. In our opinion, as a matter of justice between the parties, and of sound public policy, the title to growing crops does not pass to a purchaser at a judicial

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sale. If such be the law, and we so regard it, on the facts conclusively established the plaintiff could not recover; hence there can be no reversible error in the record.

It is recommended that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

HAMMOND & HAMMOND V. MILO C. KING.

FILED DECEMBER 17, 1902. No. 12,323.

Commissioner's opinion. Department No. 1.

1. **Trial:** *INSTRUCTIONS: ISSUES, PRESENTING NEW. An instruction presenting a new issue in the case, which has not been raised by the pleadings or litigated on the trial, is properly refused.
2. **Evidence:** SUFFICIENT. Evidence examined, and found sufficient to sustain the verdict of the jury and the judgment thereon.

ERROR from the district court for Nuckolls county. Tried below before STUBBS, J. *Affirmed.*

W. F. Buck, S. A. Searle and Hammond & Hammond,
for plaintiff in error.

S. W. Christy and C. H. Sloan, contra.

KIRKPATRICK, C.

This is a suit brought by Hammond & Hammond, as a copartnership, plaintiff in error, against M. C. King, defendant in error. There was a verdict and judgment against plaintiff in error in the district court and the case is brought to this court for review. The petition alleges that plaintiff in error in March, 1900, purchased from defendant in error his law business, certain law books, books of account, and two certain accounts, to wit: one against B. Scroggin for \$70, and one against White & Middleton Gas Engine Company for \$175; that defendant in error

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claimed that the parties were indebted to him in the sums named; that said representations were fraudulent, that the accounts were not in existence, and the parties named were not indebted to defendant in error in any sum whatever; that by reason of the premises, the defendant had had and received of plaintiff the sum of \$245, for which plaintiff had received no consideration, and for which it prayed judgment against defendant.

The answer alleged that in 1900 defendant had sold his law business and good will at Superior, Nebraska, together with a portion of his office fixtures and library to J. M. Hammond, a member of the firm of Hammond & Hammond, plaintiff, that the agreed value placed upon the library and fixtures was \$159.50, and that the agreed value of the business accounts and good will was the sum of \$90; that included in the business and good will turned over to J. M. Hammond was a case pending for White & Middleton Gas Engine Company, and a collection against J. G. Graham and Nancy Graham, in favor of B. F. Scroggin; that the amount of fees to be realized, if any, on account of said two items was uncertain, and depended wholly upon the results to attend the suit and the collection. Defendant denied that he made any representations as to the value of said two items of business, or in any manner undertook or agreed that said parties would pay anything on account of said business; that he did not guarantee that anything would be paid on either of said accounts; that the assignment of the two accounts was made at the request of plaintiff J. M. Hammond, and was wholly without consideration, and simply as an accommodation, and denied every other allegation of the petition. To this answer for reply was filed what in effect may be treated as a general denial.

But two questions are presented by the record in such manner as will enable us to examine them; first, that the verdict is contrary to the evidence, and second, that the court erred in refusing to give instruction No. 1 requested by plaintiff in error. Objection is made to some of the

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instructions given by the court on its own motion, and the refusal to give other instructions requested by plaintiff in error, but these alleged errors can not be given consideration because of the failure of plaintiff in error to save proper exceptions to the action of the trial court thereon.

As to the first point, it may be said that an examination of the evidence discloses that the verdict of the jury is abundantly supported; indeed, it may be said that a fair preponderance of the evidence is clearly in favor of defendant in error. This being true, this court is powerless to disturb the verdict. The instruction requested, the refusal to give which is the other assignment of error made, is as follows: "1st. An account is a chose in action. 2d. Where a person assigns in writing a chose in action or other claim, whether negotiable or not, he impliedly warrants that it is valid, and that the debtor or obligor is liable to pay it, and if in fact the claim is invalid, the assignor is liable to the assignee in the amount paid for the assignment." This is in reality two instructions, but plaintiff in error contends that it is one, and that the instruction in this form was the one excepted to and was so regarded by the trial court upon the motion for a new trial. It will be so regarded here.

In the petition filed in the case, it was pleaded that as a part of the contract for the sale of the books, fixtures, and good will of the business, and the two accounts mentioned, King, defendant, promised and agreed that if the accounts were not paid by the parties against whom they ran, he would pay them. J. M. Hammond, who made the contract on behalf of plaintiff in error, testified that King expressly agreed that he would take up the accounts and pay back the money, if they were not paid. This was denied by King, both in the answer and by the testimony of himself and wife, and it may be added, that nearly all of the circumstances in the case go to disprove the testimony of Hammond. This presented the issue upon which the case was tried and submitted to the jury. The requested instruction seeks to present the question of im-

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plied warranty in the sale of choses in action. This question was not presented by the pleadings, seems not to have been litigated on the trial, and was never considered by the trial court. The instruction not being material or pertinent to the issues joined, its refusal by the trial court was not error.

It is suggested by defendant in error that the petition fails to state a cause of action. While we are inclined to this view, the conclusion already reached disposes of the case upon other grounds, and this question will not be considered or determined. The judgment of the trial court is right, and it is recommended that the same be affirmed.

HASTINGS and LOBINGIER, CC., concur.

AFFIRMED.

OMAHA BRIDGE & TERMINAL RAILWAY COMPANY V. ABRAHAM L. REED ET AL.

FILED DECEMBER 17, 1902. No. 12,337.

Commissioner's opinion. Department No. 1.

1. **Eminent Domain: CONDEMNATION PROCEEDINGS: RIGHT OF MORTGAGEE TO APPEAL FROM AWARD.** A mortgagee who is a party to condemnation proceedings for right of way over premises has a right of appeal from an award of damages for the taking of such premises independently of the owner of the fee.
2. **Eminent Domain: AWARD: APPEAL BY MORTGAGEE: WAIVER.** Such right of appeal on behalf of a mortgagee is not lost nor suspended by the filing of a claim for payment of the mortgage against the estate of the mortgagor.
3. **Eminent Domain: AWARD: EVIDENCE: SUFFICIENT.** Evidence in this case held sufficient to sustain an award of damages for \$5,059.

ERROR from the district court for Douglas county. Tried below before SLABAUGH, J. *Affirmed.*

Wharton & Baird, for plaintiff in error.

Hall & McCulloch, contra.

HASTINGS, C.

The essential question in this case is whether or not a mortgagee who has been made a party to condemnation proceedings for right of way by a railway company has an appealable interest in the action, and one which it can prosecute independently of the other defendants.

July 11, 1898, plaintiff in error filed a petition in the county court of Douglas county alleging that it needed for the purpose of constructing its tracks certain lands in Douglas county, among them the track in question here. It proceeded under the statute to procure the appointment of six freeholders to appraise the property. Subsequently an amended petition was filed asking for some additional premises; both of these petitions allege that these lands were owned by Edward T. Stotesbury and others, including executors and trustees of Anthony J. Drexel, deceased; that the defendants in error claim some interest in the premises by way of mortgage or otherwise, and the defendants here were made parties to the proceedings.

The freeholders assessed the damages by reason of the taking of the premises at \$1,700. The owners in fee made no attempt to appeal. These premises consisted, as reported by the appraisers, of 1.14 acres, but are now claimed by the bridge company to contain only 1.09 acres. They are part of a tract of 66 acres on which the defendants here hold a mortgage for \$250,000 and accrued interest. The defendants procured a transcript and endeavored to bring into the action by a subsequent transcript some other small tracts of land. This subsequent transcript was stricken out by the district court. A motion was made by the plaintiff to dismiss the appeal because it did not include the owners of the fee title. This motion was overruled. A motion was then filed to dismiss the appeal for want of an appeal bond. Both of these motions were based upon the same theory, namely, that these mortgagees had no independent right of appeal and that the bond which

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they had given was not a bond of an owner as required by the statute. This motion was also overruled, and the court ordered that the company answer to the appeal in ten days and that the present defendants in error reply in five days thereafter. An answer was filed setting forth the condemnation proceedings and assessment of damages at \$1,700; their payment into the county court; the ownership of these premises in question by the mortgagors; the mortgage of \$250,000 to the defendants in error; that the owners had not appealed; that the mortgagees were the only appealing parties; that they alone filed the appeal bond, setting it forth; that the interest of the appellants was merely that of mortgagees and was antagonistic to the owners; that the mortgagees had filed their claims against the estate of Anthony J. Drexel, and these claims had been allowed, an appeal taken, the appeal dismissed, and error proceedings taken to this court in which they were alleged to be still pending. A demurrer was sustained to this answer, and then the matter was tried to the district court without pleadings, a jury being waived. On May 6, 1901, the court assessed damages in favor of the mortgagees, for the taking of these premises, stated as consisting of 1.14 acres at \$5,059.50, and on May 11, a motion for new trial was overruled and the company brings error to set aside the judgment on this finding of the district court.

As above suggested, the essential question is whether or not these mortgagees had a right to appeal separately from the owners of the fee. There is, of course, the additional question of whether or not the evidence sustains the finding of the trial court as to the amount of damages, but this does not seem to be seriously contested. It is not seriously claimed that there is no evidence in the record sufficient to support this finding, if it is concluded that these mortgagees had a right to appeal from the decision of the appraisers.

It is claimed that these mortgagees are not owners, and that our statute provides only for proceedings against

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owners by way of condemnation and for an appeal by owners. A large number of cases are cited from other states in support of this position. The answer to this is, simply, that there are various statutes in various states and various decisions of the courts construing them, but that our statute has been construed by this court in *Gerard v. The Omaha, N. & B. H. R. Co.*, 14 Neb., 270, to include all persons who have an interest in the estate, and in *Dodge v. The Omaha & S. W. R. Co.*, 20 Neb., 276, it has been expressly decided that the mortgagee is an owner within the meaning of this statute. A further answer would be that if this statute only provided for proceedings against owners, the company by including these mortgagees in this proceeding has itself interpreted the statute, and itself declared that they are owners; whether they were originally rightfully included or not, having taken part in these proceedings, they would be bound by them. Having been included by the Bridge & Terminal Company with a view to conclude their interest, it seems clear that they must be allowed a right of appeal.

In *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co.*, 51 Neb., 659, it is declared that an appealable interest exists where the judgment or decree so affects a party or privy to the record that he would derive a substantial benefit from its modification or reversal. There seems no sort of a doubt that these mortgagees would have a substantial interest in the augmentation of the fund which is subject to their lien. It would seem that the Bridge & Terminal Company can not take proceedings which shall conclude the rights of these mortgagees as to the property taken and make these mortgagees a party to these proceedings without conferring upon them the right of appeal. But it is claimed that if they appealed they must in some way make the owners of the fee parties to the proceedings. This does not seem to be the rule. If these mortgagees have a right of appeal, their appeal of itself brings up all the parties necessary for its determination. *Polk v. Covell*, 43 Neb., 884; *Claffin v. Amcri-*

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can National Bank of Omaha, 46 Neb., 884; *Johnson v. Reed*, 47 Neb., at page 327. These cases rest upon the doctrine of *McHugh v. Smiley*, 17 Neb., 626, which has been frequently cited with approval. That there was no error in overruling the motion to dismiss the appeal, none in denying the motion to dismiss on account of appeal bond being executed only on behalf of the mortgagees, and none in sustaining the demurrer to the answer, seems clear.

The additional question involved in that answer is whether or not in filing their claims against the estate of Anthony J. Drexel these trustees abandoned their mortgage. Counsel seek to claim under Code provisions providing that one who has resorted to proceedings at law must exhaust them before he will be permitted to seek a foreclosure of his mortgage. This evidently has no application to the present proceeding. This is not a proceeding to foreclose a mortgage. It is an attempt to preserve the full value of their lien upon certain lands from which the Bridge & Terminal Company is seeking to divest that lien. The only basis on which the proceedings in probate could be held to prevent the mortgagees asserting their right would be that such probate proceedings waived not the immediate right to foreclose but absolutely the entire lien. It is not possible to so hold.

As above suggested, it is not seriously claimed that there is no evidence to support the finding of the trial court as to the amount of damages. It is claimed, somewhat inconsistently, that the testimony goes to show that the remaining portions of the tract are still valuable enough to furnish ample security for the payment of the \$250,000 mortgage and interest. Whether this is so or not, these mortgagees have the right to have the full value of the land taken applied towards the payment of their claim.

It is also claimed that instead of there being 1.14 acres there are only 1.09 acres taken and that the damages found by the court are therefore to that extent in excess of the true amount. There was not, however, any appeal from

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the finding of the county court as to the amount of land taken. The Bridge & Terminal Company is seeking to uphold the finding and judgment of the county court and it can hardly be heard to claim an error in respect to the amount of the land taken. This proceeding is a hearing without pleadings and in such cases the only question before the court is the amount of damages; if other issues are involved they must be pleaded to be available. *Republican Valley R. Co. v. Hayes*, 13 Neb., 489; *Trester v. Missouri P. R. Co.*, 33 Neb., at page 185.

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

AFFIRMED.

NOTE—A rehearing of the above cause was denied in an opinion, by SULLIVAN, C. J., filed July 3, 1903. In this opinion, however, the former one is modified by holding that the appeal in the cause was not effective against the landowner and "the freeholders' award, so far as he is concerned, is conclusive." This opinion is reported in 96 N. W. Rep., 276.—REPORTER.

THE SUPREME LODGE OF THE SONS AND DAUGHTERS OF PROTECTION V. EMMA E. UNDERWOOD.

FILED DECEMBER 17, 1902. No. 12,338.

Commissioner's opinion. Department No. 3.

1. **Insurance: FRATERNAL: SUICIDE, ABSENCE OF PROVISION AGAINST.** A certificate of membership, in favor of a person therein named as beneficiary, in a fraternal insurance company organized for the benefit of its members and beneficiaries, is not avoided by the suicide of the assured, in the absence of a provision in the contract of insurance to that effect.
2. **Insurance: APPLICATION AS A PART OF POLICY: PLEADING.** Where it is claimed that the application is a part of the contract of insurance in such company, such fact must appear from the language of the policy, application, constitution or by-laws of the company, or by apt averments in the pleadings of the party thus claiming that it is.

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ERROR from the district court for Cherry county. Tried below before WESTOVER, J. *Affirmed.*

Frank L. Weaver and Frank J. Kelley, for plaintiff in error.

Allen G. Fisher, A. M. Morrissey, Charles J. Buell and Chauncey L. Wood, *contra.*

ALBERT, C.

This action was brought by Emma E. Underwood, to recover on a beneficiary certificate issued by The Supreme Lodge of the Sons and Daughters of Protection, a fraternal insurance company organized for the benefit of its members and beneficiaries, insuring the life of her husband for her benefit. The petition is in the usual form and sufficiently states a cause of action. In the argument it is claimed that as the petition originally stood, it alleged that the assured was accidentally shot and that the word "accidentally" was stricken out by leave of court after the introduction of the testimony. But the petition shown by the transcript does not contain the word "accidentally," nor are we able to find, from an examination of the record, that it ever contained the word. Whether it did or not, however, in our view of the case, is immaterial. The defense relied on is that the assured committed suicide. The answer, among other things, contains the following allegations: "That at the time of issuing said certificate, * * * (the defendant) had in its possession the following agreement made, executed and delivered to it by the said David M. Underwood which was in words and figures as follows, to wit:" Then follows a copy of what purports to be an application of the assured for membership in the defendant order, containing, among other stipulations, the following: "I also agree, that should I commit suicide within two years from the date of my admission into the order, whether sane or insane at the time, that this contract shall be null and void, and of no bind-

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ing force upon the said supreme lodge." Then follows the allegation that the defendant would not have issued said certificate, "but for the agreement, representations and statements, made by the said Daniel M. Underwood in his application for membership." The jury returned a verdict for the plaintiff, and judgment was given accordingly. The defendant brings error.

Every defense, save that of suicide, is eliminated from this case, and the reasons urged for a reversal of the judgment of the district court are based entirely on the evidence, rulings and instructions of the court in regard to that defense. We do not deem it necessary to examine into those reasons, because we are satisfied that the question of suicide is immaterial, in view of the record. The certificate names the plaintiff as the beneficiary. It contains no provisions exempting the defendant from liability in case the assured dies by his own hand. Neither the constitution, nor the by-laws of the defendant, contain any such provision. It is true what purports to be an application of the assured contains such a provision, but it is not referred to in the certificate, nor does it provide that it shall be a part of the contract; neither does the constitution or by-laws make it a part of the contract of insurance. There is no doubt it might be a part of such contract, in the absence of all these things; but in that event its relation to the contract should appear by apt averments. The answer contains no such averments; it does not even give the date of the alleged application, nor is there any allegation that the certificate is based on such application. These omissions are not cured by the allegation that the certificate would not have issued "but for the agreement, representations and statements made by the said David M. Underwood in his application for membership," because such omissions destroy the force of this very allegation. In our opinion, therefore, the certificate, with the constitution and by-laws, constitute the contract of insurance, and as the contract as thus constituted contains no provision against suicide, a defense, based on

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such ground, is not available in this case on the facts stated. *Mills v. Robstock*, 13 N. W. Rep. [Minn.], 162; *Kerr v. Minnesota Mutual Benefit Association*, 12 Am. St. Rep. [Minn.], 631; *Patterson v. The Natural Premium Mutual Life Ins. Co. of Madison*, 100 Wis., 118; *Fitch v. American Popular Life Ins. Co.*, 59 N. Y., 557, 17 Am. Rep., 372; *Goodwin v. Provident Savings Life Assurance Society*, 32 L. R. A. (Ia.), at page 476.

In this view of the case, the record shows no defense to the action, and the errors relied upon, should they be held errors, are without prejudice to the defendant.

It is recommended that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

H. M. BRABHAM ET AL., REMONSTRATORS, V. THE COUNTY
OF CUSTER ET AL., PETITIONERS.

FILED DECEMBER 17, 1902. No. 12,339.

92 NW 989
Commissioner's opinion. Department No. 2.

1. **Highways:** COUNTIES: ESTABLISHMENT OF ROAD: RECORD: EVIDENCE ON ERROR: STATUTES. All orders made and proceedings had by a county board in the establishment of a road are required to be recorded; hence, on error from an order establishing a road, such proceedings can be shown only by a duly certified transcript of the road-record and a properly settled bill of exceptions containing such matters considered by the board as were not to be recorded.
2. **Appeal and Error:** TRANSCRIPT: ORIGINAL FILES: STATUTES. The original files and papers are not a transcript within the meaning of section 586, Code of Civil Procedure, and can not take the place thereof nor supply defects therein.
3. **Highways:** RECORD: FINDING OF "PUBLIC GOOD." It is not necessary to enter upon the record an express finding that the public good requires the road to be opened.
4. **Parties:** DESCRIPTION OF, AS "ET AL.": EFFECT IN PETITION IN ERROR. The words "et al." following the names of parties to a petition in

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error are not a sufficient designation of any persons not expressly named in the petition, even though such persons were parties before the inferior tribunal.

ERROR from the district court for Custer county. Tried below before SULLIVAN, J. *Affirmed.*

J. R. Dean, for plaintiffs in error.

C. A. Holcomb and *L. E. Kirkpatrick*, *contra.*

POUND, C.

The plaintiff in error was one of several remonstrants against the establishment of a public road. Upon hearing before the county board, the remonstrance was overruled and the road ordered. Thereupon error was taken to the district court, where the order of the county board was affirmed.

The district court was clearly right in holding that it could not review the proceedings of the county board on the record presented. The transcript filed showed merely that there had been a petition, supplemental petition and remonstrance, that a hearing was had and that the remonstrance was overruled and the road ordered. The petition and supplemental petition themselves, the notice, and the preliminary orders and proceedings were not set out. There was no bill of exceptions. An order was made to transmit the original files and papers, and this was done; but the court afterwards held that there was no authentic record of the proceedings of the board nor of the evidence before it. Under sections 28 and 29, chapter 78, Compiled Statutes, all orders made and proceedings had in the establishment of the road, as well as the plat and field notes, were required to be recorded. Hence these matters could be shown only by a duly certified transcript of the road-record; and, if the record did not show them, a proper record could have been compelled, so as to enable the remonstrants to secure the necessary transcript. All other papers, files, and evidence, considered by the board or

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adduced at the hearing should have been preserved in a properly settled bill of exceptions. The original files and papers are not a transcript within the meaning of section 586, Code of Civil Procedure, and can not take the place thereof nor supply defects therein. *School District No. 49 of Adams County v. Cooper*, 44 Neb., 714, 717. Nor do they constitute a bill of exceptions until settled and certified as required by law. The only error assigned which could be considered was the omission to enter on the record an express finding that the public good required the road to be opened. No such entry was necessary. *McNair v. State*, 26 Neb., 257, 260; *Barry v. Deloughrey*, 47 Neb., 354.

We have treated this cause as if the petition in error were sufficient to present a case for review. But it is doubtful whether anything is really before us. There were a number of remonstrants before the county board, and they made joint objections and took joint exceptions. The petitions in error in both courts purport to be brought and are signed by H. M. Brabham "et al." No one other than Brabham is expressly named anywhere in either court. A petition in error is a new and independent proceeding before a distinct court. The words "et al." are not sufficient to designate any persons not expressly named in the petition, even though such persons were parties before the inferior tribunal. *Hutts v. Martin*, 141 Ind., 701, 41 N. E. Rep., 329; *Cameron v. Sheppard*, 71 Ga., 781; *Miller v. McKenzie*, 10 Wall. [U. S.], 582; *Kellett v. Rathbun*, 4 Paige Ch. [N. Y.], 102.

We recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

Miles v. Walker. *Fremont Foundry & Machine Co. v. Norton.*

WILLIAM H. MILES ET AL. V. JACOB J. WALKER ET AL.

FILED DECEMBER 17, 1902. No. 12,345.

Commissioner's opinion. Department No. 1.

MALICIOUS PROSECUTION: ATTORNEY'S ADVICE: MALICE: PROBABLE CAUSE: EVIDENCE.

ERROR from the district court for Frontier county. Tried below before NORRIS, J. *Affirmed.*

S. A. Searle, for plaintiffs in error.

J. L. White, *contra*.

HASTINGS, C.

The determination of the case of *Miles v. Walker*, 66 Neb. 728, 92 N. W. Rep., 1014, in which an opinion is filed to-day, decides this one also, as both verdicts were rendered upon the same evidence and under similar pleadings, under an agreement that separate verdicts should be rendered according to the damages sustained by each party.

KIRKPATRICK and LOBINGIER, CC., concur.

AFFIRMED.

FREMONT FOUNDRY & MACHINE COMPANY, APPELLEE, V. W. C. NORTON, APPELLANT.

FILED DECEMBER 17, 1902. No. 12,351.

Commissioner's opinion. Department No. 2.

1. **Accord and Satisfaction: PAYMENT BY CHECK FOR LESS THAN AMOUNT DUE: ACCEPTANCE.** The acceptance by the creditor of a debtor's check for less than the whole amount of a past due liquidated account, will not operate as an accord and satisfaction, unless such check is accompanied by the condition that such acceptance shall be a full satisfaction and payment of the whole debt.

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2. **Accord and Satisfaction:** PAYMENT, PART BY CHECK, PART BY SET-OFF; ACCEPTANCE OF CHECK: BAR. A check for a less amount than the contract price for a steam boiler was sent by the debtor to the creditor, without any condition as to its acceptance, and with a statement in the nature of a set-off or counter-claim which, if allowed, would balance the account. The check was accepted, and the amount thereof credited on the account; the debtor was immediately notified of that fact, immediate payment of the balance was demanded and the debtor was informed that his claim would not be considered. *Held*, That the acceptance of the check was not a bar to an action to recover the balance of the debt.
3. **Accord and Satisfaction:** EVIDENCE: SUFFICIENT. Evidence examined, and *held* sufficient to sustain the judgment.

APPEAL from the district court for Butler county. Tried below before SORNBORGER, J. *Affirmed*.

Matt Miller, for appellant.

McNish & Graham, contra.

BARNES, C.

The Fremont Foundry & Machine Company commenced this action against W. C. Norton, in the district court for Butler county, to foreclose a mechanic's lien upon the defendant's mill, situated in said county. It appears from the record that on the 31st day of July, 1900, George Norton, defendant's son and agent, entered into an agreement with the plaintiff by the terms of which plaintiff agreed to construct and furnish to defendant a certain horizontal tubular boiler, to be delivered f. o. b. the cars at Brainard, Nebraska, for the sum of \$140, and defendant agreed to accept the same at that price; that it was to be used in making certain repairs upon the defendant's mill and to take the place of an old, worn-out boiler, which was then in use therein. Afterwards a dispute arose as to when the boiler was to be delivered. Defendant's agent testified that it was to be delivered in two weeks, while the plaintiff's evidence tended to establish the fact that it was to be delivered sometime between two and three weeks after the date of the contract. The plaintiff was delayed in the construction of the boiler by an accident

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in breaking some part of its machinery, and on the 15th day of August, 1900, George Norton again visited the city of Fremont, and finding it not completed claimed to be disappointed, and threatened to order a boiler elsewhere if the plaintiff could not perform its part of the contract within a certain time. Considerable discussion arose over the matter, and finally, to avoid any trouble, it was agreed that the plaintiff should have the boiler completed as soon as possible and would reduce the price of it from \$440 to \$380. The boiler was completed and shipped on the night of the 19th of August, and arrived in Brainard on the morning of the 21st of that month. It was accepted, and placed in position in the mill belonging to the defendant, and was thereafter used by him. At the time of its delivery the plaintiff mailed a statement of the purchase price thereof, to wit, \$380, to the defendant, and demanded payment. No objections were made on account of delay in delivery. Payment was not made, however, and the defendant wrote several letters to the plaintiff excusing the delay because he feared that the boiler was leaking, and stated in two of the letters that as soon as it could be cooled off he would ascertain the facts in relation to it and advise the plaintiff as to whether it was leaking or not. In the last one of these letters he stated that if the boiler was found to be all right the plaintiff would promptly receive its money. The wording of the letter was as follows:

"We were waiting before sending remittance until boiler cooled down next Sunday, so we could get under it to make a thorough examination. If boiler shows no leaks around flues, rivets or sheets you will receive your money at once."

This letter was written on the 14th of September, and on the 17th day of the same month, the defendant again wrote to the plaintiff as follows:

"BRAINARD, NEBR., Sept. 17, 1900.

"Fremont Foundry & Machine Co., Fremont, Nebr.:

"DEAR SIR: Enclosed we hand you check for \$323.60 to balance our account as per statement enclosed."

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The statement was as follows:

"Fremont Foundry & Machine Co., by bill of	
Aug. 18	\$380 00
Dr. two days delay, Aug. 18 and 20 @ \$20..	\$40 00
Freight	15 50
Message, and express on 2½ tap.....	90
Total	\$56 40
Check to balance.....	323 60
	\$380 00"

Accompanying this letter and statement was the check mentioned therein. This was received by the plaintiff in Fremont on September 21, 1900, and credit was given defendant on account for the amount of the check, and the bill for freight. Thereupon plaintiff's manager wrote the following letter, and mailed it to defendant:

"FREMONT, NEBR., Sept. 21, 1900.

"*Brainard Roller Mills, Brainard, Nebr.*

"GENTS: We are in receipt of yours enclosing check for \$323.60 and freight bill of \$15.50 which amounts we have placed to your credit. We note you have deducted \$40 for delay and 90c for expenses. Now, gentlemen, we do not propose to bandy words with you, we are rather weary of this boys' play on your part, and considering the fact that you got the boiler at less than cost will only say that unless we get a draft from you for the balance by return mail we will file a lien and proceed to foreclose as fast as possible. Yours,

"FREMONT FOUNDRY & MACHINE CO.

"MARR."

- This letter was received by the defendant. He never answered it, and never remitted the balance claimed by the plaintiff. Thereupon the plaintiff filed its lien as stated in the foregoing letter and brought this suit to foreclose the same. Upon the evidence introduced on the trial, the court found for the plaintiff, rendered a judg-

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ment against the defendant for the balance due on the account, and decreed a foreclosure of the mechanic's lien. From this judgment and decree defendant appealed to this court, and hereafter he will be called the appellant while the plaintiff in the court below will be called the appellee.

1. The finding of facts by the trial court, having been based on conflicting evidence, and evidence that seems to us to preponderate in favor of the contentions of the appellant, such findings will not be set aside. This leaves the question of accord and satisfaction, which is contended for by the appellant, the only one for our consideration.

2. Appellant contends that the acceptance of the check with full knowledge of the contents of the letter, in which it was sent, with the statement of account, operated as an accord and satisfaction of the whole amount due upon the contract. To support this contention the case of *Widner v. Western Union Telegraph Co.*, 16 N. W. Rep. [Mich.], 635, is cited. That case was one wherein it was sought to recover a balance due for poles sold and delivered to the telegraph company. The company pleaded accord and satisfaction. At the trial the plaintiff introduced letters with inclosures, which letters stated that the amount inclosed was in satisfaction of the account to certain dates. The question as to whether or not the acceptance of the money operated as an accord and satisfaction was submitted to the jury under proper instructions. They found for the plaintiff, and rendered a verdict in his favor, and the appellate court sustained the judgment. This case supports the judgment and decree in the case at bar.

Our attention is next directed to the case of *Treat v. Price*, 47 Neb., 875. Our decision in that case turned upon the fact that a sum of money was tendered by the debtor to the creditor on the condition that he must accept it in full satisfaction of his demand, the amount of the debt being in dispute. It was held that the debtor must either refuse the tender or accept it as made subject to the condition. If he accepted it he accepted the condition also,

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notwithstanding any protest he may have made to the contrary. Counsel also cites the case of *Slade v. Succedburg Elevator Co.*, 39 Neb., 600. In that case there was a dispute as to the terms and conditions of the contract and the amount due thereon. It was alleged in the answer "that the elevator was very defectively constructed, and that it was not completed as agreed, and that, therefore, the elevator company refused to pay the amount to which appellant would have been entitled upon full compliance with the terms of the aforesaid contract; that to settle the differences it was agreed finally that appellant should be paid the sum of \$350 in full of his claim against the appellee, which proposition was assented to by appellant, whereupon that sum was paid by appellee to appellant, and that there was nothing due when this action was begun." It was held that there was sufficient relevant evidence from which the court might conclude that there had been made a compromise of honest differences between the contracting parties, and that pursuant to the terms of such compromise all matters of difference had been finally settled.

It will thus be seen that the case at bar does not fall within the rule laid down in any of appellant's citations. He does not bring himself within the rule announced in a single one of these cases. If there had been a statement in the letter which contained the check that it could only be received in full payment of the purchase price of the boiler, or of the amount claimed therefor by the appellee, and appellee thereupon accepted the check, its letter of protest would have availed it nothing. Such acceptance would have resulted in an accord and satisfaction. There was no condition, however, stated in the appellant's letter. By the acceptance of the check appellee did not assent to the validity of appellant's claims or demands set forth in the statement which accompanied it. The contract price for the construction and delivery of the boiler was liquidated; it was a fixed and certain amount, agreed upon between the parties; there was no dispute as to this amount; ap-

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pellant never objected to it, but when he came to make his remittance he made certain demands or claims against the appellee and sent his check for the balance of the purchase price. This was the first time that he had ever made any claim of the kind in question. The matter had never been in dispute between them, and until the receipt of the letter appellee never had any information that the appellant made a claim against it on account of the matters stated therein. There was no statement in the letter that if the check was received it must be received as a full payment of the appellant's demands against appellee, and therefore its acceptance could hardly be considered to amount to an accord and satisfaction. The payment in money of a part of the whole debt is not a good satisfaction, even if accepted, unless the amount is in dispute at the time of payment, or is contingent upon the condition that it shall be received in full satisfaction of the whole debt. 1 Am. & Eng. Ency. Law [1st ed.], page 97; *Perin v. Cathcart*, 89 N. W. Rep. [Ia.], 12; *Preston v. Grant*, 34 Vt., 201; *Lord v. Atkins*, 33 N. E. Rep. [N. Y.], 1035; *Myers v. Byington*, 34 Ia., 205; *Treat v. Price*, *supra*.

A part payment only of a liquidated past due debt in full settlement is not good as an accord and satisfaction. *McIntosh v. Johnson*, 51 Neb., 33, 70 N. W. Rep., 522; *Meyer v. Green*, 69 Am. St. Rep. [Ind.], at page 349, note; *Hodges v. Truax*, 19 Ind. App., at pages 653-658, 49 N. E. Rep., 1079.

We therefore hold that the acceptance of the check by the appellant did not bar an action in its favor to recover the balance due on the account; that the decree of the district court was right, and we therefore recommend that it be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

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MINNIE BOLLINGER V. JAMES H. KNOX, EXECUTOR OF THE
ESTATE OF JOHN KNOX, DECEASED.

FILED DECEMBER 17, 1902. No. 12,354.

Commissioner's opinion. Department No. 2.

1. **Pleading: DEFENSES INCONSISTENT: ELECTION: WILLS: DISTRIBUTION: STATUTES.** Defenses to a petition for distribution under a will which allege that the cross-petitioner was omitted by mistake from the will and also that she is provided for in the third clause of the will, are inconsistent, and a rule of the county court requiring an election on which of these defenses the cross-petitioner will proceed is fully warranted.
2. **Wills: CONSTRUCTION: BEQUEST TO LIVING CHILDREN AND ISSUE: ONE SON PREVIOUSLY DEAD LEAVING ISSUE.** A will contained a specific bequest to one living child and a clause bequeathing "all the residue of my estate, real and personal, to my other children," naming them, "share and share alike," and also a condition that "If any one of my children shall die in my lifetime, leaving issue or descendants, I direct that his or her share shall not lapse, but shall be paid to such descendants in equal proportions." *Held*, That the heir at law of a child who was deceased before the execution of the will is not entitled to participate in the distribution of the residue of the estate under this provision. .

ERROR from the district court for Otoe county. Tried below before JESSEN, J. *Affirmed*.

A. L. Timblin and W. H. Pitzer, for plaintiff in error.

W. M. Morning, G. W. Berge and James W. Eaton,
contra.

OLDHAM, C.

In the year 1899, John Knox, a resident of Otoe county, Nebraska, departed this life. June 18, 1892, he made and executed a will in due form of law. At the time this will was made and also at the time of his death he had five living children, viz., Mary J. Bolby and Nellie Johnson (daughters) and William J. Knox, James H. Knox and Thomas Knox (sons). In 1883, nine years before the

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will at issue was made, a son named Robert had died, leaving a daughter, Mary Bollinger, plaintiff in error in this suit, as his only heir at law. The will after providing for the payment of the debts and costs of administration from the personal property gave a specific bequest of \$5 to Mary J. Bolby, and disposed of the residue of the estate as follows: "I give and bequeath all the residue of my estate, real and personal, to my other children (namely) William J., Thomas and James H. Knox, and Nellie Johnson, share and share alike as tenants in common, to be paid to them by my executor. If any one of my children shall die in my lifetime, leaving issue or descendants, I direct that his or her share shall not lapse, but shall be paid to such descendants in equal proportions." The will also appoints James H. Knox as executor.

After this will had been admitted to probate and in the due course of administration, the executor filed his petition for final settlement and prayed therein that the residue of the estate be distributed among the four children named in the third paragraph of the will. To this petition Minnie Bollinger, plaintiff in error, filed an answer and cross-petition objecting to such distribution and asking that she be allowed to participate in said distribution as the sole heir of Robert Knox, deceased. The cross-petition was very inartistically drawn, but applying to it the most liberal rule of construction possible it can be said that it attempted to allege two different and, as we think, inconsistent causes of action; one of which attempted to state a cause of action under section 149, chapter 23, Compiled Statutes, *i. e.*, that cross-petitioner had been unintentionally and by mistake or accident omitted from the will; the other cause of action alleged was that she had been provided for in the third clause of the will and her prayer was that she be included with the four children named in the third clause of the will in an equal distribution of the residue of the estate. To these objections and cross-petition the executor filed

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a motion in the county court to require the cross-petitioner to elect on which cause of action she should proceed. This motion was sustained over the objection of the cross-petitioner and the case was tried in the county court on the claim that the plaintiff in error was entitled to distribution under the third clause of the will. The county court found the issues in favor of the executor and decreed a distribution as prayed for in his petition. Plaintiff in error thereupon filed her petition in error in the district court for Otoe county for a review of the proceedings had in the county court. On hearing had in the district court the petition in error was dismissed and the judgment of the county court sustained, and from this judgment of the district court the case comes here on error.

The first question presented is on the action of the county court in requiring plaintiff in error to elect on which cause of action she would proceed in the trial in that court. As intimated in the statement of the case, we think that the two causes of action set forth in the cross-petition were plainly inconsistent.

Plaintiff in error, to sustain the first cause of action alleged in her cross-petition, must necessarily establish the existence of the following facts: (1) that she was not provided for in the will; (2) that the failure to provide for her was by mistake and unintentional on the part of the testator, and (3) that she was either a child or the issue of a deceased child of the testator. On the other hand the second cause of action depends on an interpretation of the will which by some canon of construction would be held to show an intention on the part of the testator to provide for her in the clause under which she claims; in other words, to sustain the second cause of action plaintiff in error would be required to show that she was not omitted from the will unintentionally, but that she was intentionally provided for under a proper construction of the will.

With some misgivings as to whether the will at issue

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is properly before us for construction under the peculiar condition of the record in this case, we have thought it best to treat it as here and determine whether or not in our opinion it was properly construed by the lower court. Referring back to the will and the circumstances surrounding its execution as already set forth in the statement of the case; we find that at the time the will was made the testator had five living children and one dead one; that by the second clause of the will he made a specific bequest to one of the living children, and that by the third clause of the will he bequeathed all the residue of his estate to the other four children, who were specifically named in the bequest, and that to this bequest was added the provision: "If any one of my children shall die in my lifetime, leaving issue or descendants, I direct that his or her share shall not lapse, but shall be paid to such descendants in equal proportion." No reference is made in the will to the heirs or descendants of any child who was deceased at the time the will was made, and the condition above quoted intends to provide that if any of testator's children named in this clause of the will shall die in his lifetime their issue or descendants shall take the share provided for the deceased child. If plaintiff in error were permitted to take under the will she could only take by substitution the share left for her deceased father, Robert Knox, for whom, as we have already seen, there is no provision in the will. And again, the will had disposed of the entire residue of the estate to one class of heirs, *i. e.*, living children; plaintiff's ancestor having been dead at the time this bequest was made could take no share under it.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

Woodward v. Kavan.

REBECCA W. WOODWARD, APPELLEE, v. JOSEPH KAVAN ET AL., APPELLANTS.

FILED DECEMBER 17, 1902. No. 12,368.

Commissioner's opinion. Department No. 3.

Mortgages: FORECLOSURE: APPRAISAL: STATUTES.

APPEAL from the district court for Douglas county.
Tried below before KEYSOR, J. *Affirmed.*

Louis Berka and John D. Ware, for appellants.

F. A. Brogan, contra.

DUFFIE, C.

This is an appeal from an order confirming a sale of real estate made under a decree of foreclosure. The decree provided that the premises "shall be sold according to law as upon execution." The only objection urged is the claimed unconstitutionality of sections 491a-491d, Code of Civil Procedure. These sections were brought into our statute in 1875, page 60, by an act entitled "An Act for the more Equitable Appraisement of Real Property under Judicial Sale." The objection urged is that the title relates to the appraisement of property taken on execution, while the act itself provides both for an appraisement and a sale of the property. If we were to concede, which we do not, that the act conflicts with that provision of the constitution of 1866 which prohibits the passage of a bill containing more than one subject which is clearly expressed in the title, then the law attempted to be repealed by this act would still be in force and authorized the sale which was made.

We recommend that the order appealed from be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

Reiss v. Argubright.

CHRISTOPHER G. REISS, APPELLANT, v. GEORGE W. ARGUBRIGHT, APPELLEE.

FILED DECEMBER 17, 1902. No. 12,369.

92 NW 985
Commissioner's opinion. Department No. 2.

Trial: EVIDENCE: FRAUD: MISCONDUCT OF COUNSEL.

APPEAL from the district court for Lancaster county.
Tried below before CORNISH, J. *Affirmed.*

Willard E. Stewart, for appellant.

Frank J. Kelley, contra.

POUND, C.

There is no merit in this appeal. The action was brought to obtain a new trial in an action of replevin on the ground that plaintiff had been prevented by misconduct of defendant's counsel from obtaining settlement of a bill of exceptions and because of alleged fraud in the production of false and perjured testimony at the trial. The defendant, in connection with a general denial, pleaded that the failure to procure a bill of exceptions was due to the laches of plaintiff's counsel. The evidence is conflicting, and the trial court found for the defendant. Complaint is made because plaintiff was not permitted to amend his petition during the trial. The ruling objected to can be reviewed only by petition in error.

We recommend that the decree be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

Kinney v. Bittinger.

LAMBERT C. KINNEY, APPELLEE, V. RALPH R. BITTINGER,
APPELLANT, ET AL.

FILED DECEMBER 17, 1902. No. 12,375.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: AFFIDAVITS FOR CONTINUANCE: EXCEPTIONS, BILL OF.** Affidavits for continuance must be embodied in the bill of exceptions if the right to a continuance is to be examined on its merits upon review.
2. **Appeal and Error: APPEAL IN EQUITY: EVIDENCE, ERRORS IN EXCLUSION OF.** An appeal in equity is not a proceeding to correct errors in the exclusion of evidence.

APPEAL from the district court for Kimball county.
Tried below before GRIMES, J. *Affirmed.*

J. L. McIntosh and William P. Miles, for appellants.

Wilcox & Halligan and J. J. Kinney, contra.

HASTINGS, C.

In this case the appellants seem to have mistaken their remedy. They say the principal ground of complaint is that the trial court erred in refusing a continuance. An examination of the record discloses that there is no showing with reference to this right of a continuance embodied in the bill of exceptions. The bill of exceptions and its certificate show that the only matter preserved in it is the evidence produced at the trial. This being so, of course, affidavits for a continuance merely included in the transcript by the clerk can not be considered. *Morsch v. Besack*, 52 Neb., at page 505; *Wright v. State*, 45 Neb., 44; *Korth v. State*, 46 Neb., 631; *First National Bank of Madison v. Carson*, 48 Neb., 763; *Durfee v. State*, 53 Neb., 214; *Ray v. Mason*, 6 Neb., 101. The last case has been frequently cited and always sustained. An examination of the affidavits in the transcript, however, would not indi-

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cate that there was any error on the part of the trial court in overruling the application to continue.

It is next complained that the court erred in excluding certain evidence to conversations from the cross-examination of the plaintiff. The matter offered was in no sense cross-examination and it was not error on the part of the court to sustain an objection on that ground. Complaint is made as to a number of other errors in the exclusion of evidence, but we do not discover any good ground of complaint. Certainly none are well taken in this proceeding by appeal. Appeal is not a remedy to correct errors of law. *Wilcox v. Saunders*, 4 Neb., 569. It will not present for review the rulings made during the progress of the trial. *Zimmerman v. Zimmerman*, 59 Neb., 80. Nor does it present for review the rulings of the trial court in excluding evidence. *Village of Syracuse v. Mapes*, 55 Neb., 738; *McLain v. Maricle*, 60 Neb., 353; *Ainsworth v. Taylor*, 53 Neb., 484.

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

AFFIRMED.

MARY H. GREEN ET AL. V. ANDREW DIEZEL.

FILED DECEMBER 17, 1902. No. 12,386.

Commissioner's opinion. Department No. 2.

Mortgages: FORECLOSURE: SALE: DEPOSIT BY PURCHASER. A rule of the district court requiring purchasers at a sheriff's or master's sale to deposit \$50 with the sheriff or master as a guarantee of good faith in their purchase, examined, and held reasonable.

ERROR from the district court for Douglas county. Tried below before KEYSOR, J. *Affirmed.*

David Van Etten, for plaintiffs in error.

George B. Lake and Hamilton & Maxwell, contra.

OLDHAM, C.

This is a proceeding in error seeking to reverse and set aside a decree of the district court for Douglas county foreclosing a mortgage on a lot situated in the city of Omaha, Nebraska. The decree of foreclosure was entered on March 22, 1900, and no objection was taken to the decree. The petition in error was not filed in this court until November 4, 1901, more than a year and a half after the rendition of the decree. Consequently, it is apparent that plaintiffs in error can not have the decree of foreclosure reviewed by this court at this late day. The decree is regular on its face, and the pleadings upon which it was entered are not before us; consequently, we must presume that there was competent evidence and proper pleadings to support this decree.

Objections, however, were filed and exceptions saved to the rulings of the trial court in confirming the sale made under the decree on March 2, 1901, and these objections we will examine. The first of these is that the appraised value of the lot was too low. The lot was appraised at \$6,000 and sold for \$5,000. Two affidavits were filed, one placing the value at \$7,500 and the other at \$7,800. No allegation of fraud in the appraisal is made and nothing appears from this showing that tends to impute fraud in the matter.

Another objection alleged was that the rule of the district court for Douglas county, which required every purchaser at a sheriff's or master's sale at the time the property is bid in by him to deposit with the sheriff or master \$50 as a guarantee of good faith, had the effect of preventing competition at the sale of the premises in dispute and "in fact 'chilled' all bids." With reference to this objection we might say first that there is no showing in the record that any anxious bidder was "chilled" by this rule at the sale in controversy; and again that a killing and chilling frost on intermeddlers at a judicial sale either not able or not willing to comply with such a reasonable

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requirement as this would have a purifying influence on the atmosphere surrounding such sales. Another objection urged is that a sale of the mortgaged premises was not made until eleven months after the order of sale was issued. This is absolutely immaterial as the sale was in conformity with the decree.

We therefore recommend that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

HENRY G. HARTE V. SAMUEL REICHENBERG, ADMINISTRATOR
WITH THE WILL ANNEXED OF THE ESTATE OF HENRY
DOHLE, DECEASED.

FILED DECEMBER 17, 1902. No. 12,394.

Commissioner's opinion. Department No. 1.

1. **Statutes: WORDS AND PHRASES: "TRANSACTION."** The word "transaction," as used in section 329 of the Code of Civil Procedure, embraces every variety of affairs the subject of negotiations, actions or contracts between parties. *Smith v. Perry*, 53 Neb., 738.
2. **Evidence: IDENTIFICATION BY WITNESS WITH INTEREST IN ACTION.** The contents of letters and telegrams, which pass between parties in the course of a business transaction, not otherwise identified than by a witness who has a direct legal interest in the result of the suit, are not competent evidence as against the personal representative of a deceased person.

ERROR from the district court for Douglas county. Tried below before KEYSOR, J. *Affirmed.*

J. L. Kaley and H. Fischer, for plaintiff in error.

Richard S. Horton, contra.

HASTINGS, C.

This action, an appeal from probate court of Douglas county, was tried to a jury in the district court and re-

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sulted there in a judgment for the defendant administrator. The plaintiff brings error.

Plaintiff's first cause of action is for \$567.35, the ten per cent. commission on the sale of a stock of boots and shoes for the sum of \$5,673.58, which plaintiff claims to have made about September 10, 1890, for Henry Dohle, in his lifetime. The second cause of action is for the leasing of the store room and basement at 1419 Farnam street for three years at \$200 a month, for which a commission of five per cent. of the entire rental, \$360 is asked. The administrator's answer pleads that the action did not accrue within four years before the filing of the claim in county court; that in 1890 Dohle owned the property in question and continued to own the real estate until his death in February, 1899; that on September 10, 1890, and thereafter until his death he was a resident of Sachsenberg in the empire of Germany; that, by the statute of limitations there in force, a claim for commission is barred in two years. The answer also denied all of plaintiff's allegations. A motion to strike out so much of the answer as set up the statute of limitations was overruled. A reply was then filed admitting that the contract of employment and the performance of services were more than four years before the filing of the claim in county court, but saying, that Dohle was then in Germany and never was a resident of Nebraska and the contract was a German one; that the statute of limitations of this state never began to run against the claim, and that it was not barred at any time by the laws of the German empire. At the trial the district court instructed the jury that there was no competent evidence tending to prove the claim and that a verdict should be returned in favor of the estate. A motion for new trial was filed alleging error in this instruction; a verdict contrary to law; a verdict contrary to the evidence; and errors of law occurring at the trial and duly excepted to. Under this state of the record no errors are important except the alleged one in giving this instruction. Of course, however, if the trial court excluded evidence which should

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have been submitted to the jury's consideration, this instruction was erroneous. The claim of error in overruling the motion to strike out parts of the answer can not be considered. It is not mentioned in the motion for new trial. The action of the district court seems to have been based on the proposition that no competent evidence was tendered to show the contract and the performance of the services. This was because of our statute excluding evidence against a deceased person, by any witness interested in the action as to transactions between the witness and the deceased. No evidence except the plaintiff's was offered as to any agreement or arrangement for these services. The plaintiff's testimony, so far as it was admitted, tended to show an arrangement by correspondence under which the business was done.

Complaint is made of the sustaining of an objection to the offered testimony of one Rosenzweig, to having seen and known the contents of a letter written by the plaintiff to Dohle about August 24, 1890. Objection was sustained to this offer as incompetent, immaterial and irrelevant. We are unable to discover any error in rejecting this testimony. Of course, the sending and receipt of letters or telegrams to and from a deceased person are transactions with him. *Kroh v. Heins*, 48 Neb., 691; *Smith v. Perry*, 52 Neb., 738. The trial court had properly rejected plaintiff's testimony to such transactions with no evidence before the court that this letter was ever sent to or received by Dohle, it was entirely irrelevant and immaterial what its contents were. An objection was sustained to testimony offered on the part of this witness as to the stock of boots and shoes, for whose sale a commission was asked. This testimony was also entirely irrelevant as long as the contract under which the commission was claimed remained unproven. Evidence was also tendered of the contents of a cablegram but in the absence of any proof that such cablegram was ever sent by Dohle or received by plaintiff, its contents also were immaterial, as was the testimony of Rosenzweig as to how much he paid for the

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stock of boots and shoes. The same witness' testimony as to the renting of the real estate and payment of rents was also refused, evidently for the same reason. Testimony offered by William H. Green to the value of plaintiff's services in selling the stock of boots and shoes was also refused as being irrelevant and immaterial in the absence of any proof of the contract of employment, and this is complained of as error. It would not seem so. As long as the basis of the action was unproven evidence merely going to fix the amount of damages would be immaterial.

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

AFFIRMED.

THE FIRST NATIONAL BANK OF CHADRON V. F. E. HUGHES
ET AL.

FILED DECEMBER 17, 1902. No. 12,401.

Commissioner's opinion. Department No. 3.

1. **Chattel Mortgages: DESCRIPTION OF CATTLE: VALIDITY.** A man owning a herd of two hundred cows and a hundred and forty-three calves, executed a mortgage containing the following description: "Two hundred (200) head of native cows, in ages from three to seven years; some branded L and others SH; also with one hundred head of above mortgaged cows are included in this mortgage one hundred head of their calves, which are to be branded SH. The above described chattels are now in my possession on," etc. *Held*, That this description was so indefinite as to be void as against subsequent purchasers of a part of the herd of calves, without actual notice of the instrument.
2. **Replevin: PARTY TO ACTION, FROM ONE NOT: INTERVENTION: STATUTES.** When chattels are taken under a writ of replevin from the possession of a person not a party defendant to the action, he is entitled, on motion, to be admitted to defend his possession without reference to the statute on the subject of intervention.
3. **Replevin: TITLE, RECOVERY ON STRENGTH OF.** In replevin the plaintiff must recover, if at all, upon the strength of his own title and not because of the weakness of that of his adversary.

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ERROR from the district court for Sheridan county. Tried below before WESTOVER, J. *Affirmed.*

Albert W. Crites, for plaintiff in error.

C. Patterson and W. W. Wood, *contra.*

AMES, C.

On August 29, 1900, F. E. Hughes executed to the plaintiff a chattel mortgage containing this description: "Two hundred (200) head of native cows, in ages from three to seven years; some branded L and others SH; also with one hundred head of above mortgaged cows, are included in this mortgage, one hundred head of their calves, which are to be branded SH. The above described chattels are now in my possession, on section —, township —, range —, Sheridan county," etc. At that time there were on the mortgagor's ranch 143 calves which had already been branded with the letters SH. It does not appear that there were then or subsequently, on that ranch, any calves which were afterwards so branded, nor is it ascertained or apparently ascertainable which of the 143 calves were the progeny of the cows, or of any of them, conveyed by the mortgage. Hughes absconded from the country after having sold fifty of the calves to Monnier and twenty-one of them to the defendant Rising, and possession had been taken by the purchasers before the action was begun. The action is in replevin to recover all the property mentioned in the mortgage. Hughes and Rising were originally made defendants thereto and Monnier was afterwards made a defendant upon his own motion and permitted to file an answer which is a general denial. Fifty of the calves were taken under the writ from the possession of Monnier and he had an undoubted right to appear in the action and defend his possession without reference to the statute concerning interventions. He was successful in his defense, as was also the defendant Rising as to the twenty-one

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calves purchased by her. The remainder of the animals taken under the writ were awarded to the plaintiff, who brings the case to this court by petition in error.

An attempt is made to impeach the sales to Monnier and Rising on the ground that they were without sufficient or valid consideration and were, therefore, void as against the creditors of the vendor. We do not see that this question is pertinent to the present controversy. This court has held a great number of times that one claiming under a chattel mortgage is in the attitude of a purchaser and not of a creditor. It is also claimed that the defendant Rising had actual notice of the plaintiff's mortgage before she made her purchase and that she bought all of the calves in controversy with such notice, Monnier's connection with the transaction being merely in the capacity of her agent, but this assertion is denied by the parties under oath, and we do not find evidence in the record for its support. The action is in replevin and the plaintiff must recover, if at all, on the strength of his own title, and not because of the weakness of that of his adversaries. *St. John v. Swanback*, 39 Neb., 841; *Kavanaugh v. Brodball*, 40 Neb., 875. This we regard as the only important point in the case, and we are satisfied that it was rightly decided by the trial court. It does not appear from the evidence that if an officer or an agent of the plaintiff had gone to the ranch with this mortgage in his hand he could have selected from the 143 calves 100 of them that were the progeny of the 200 mortgaged cows, even although he had made inquiry in the neighborhood. In fact it may be doubted if the mortgagor could have performed that feat. But even this measure of success would not have satisfied the description in the instrument, which required the identification of a certain hundred calves as the offspring of a certain hundred head of cows, and besides as has been said, the mortgage called for calves branded subsequently to August 29, 1900, and it does not appear that Hughes ever had any calves which were branded after that date. In other words, the description in the mortgage, as re-

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spects the calves, is so indefinite as to be void; and since it was the sole foundation of the action and created no lien on the animals in suit, a verdict and judgment thereon in favor of the plaintiff could not have been upheld.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

LEWIS V. CRUM V. SWAN G. JOHNSON.

FILED DECEMBER 17, 1902. No. 12,405.

Commissioner's opinion. Department No. 1.

1. **Limitation of Actions: BONDS, ACTION ON APPEAL: STATUTES.** An action on an appeal bond is governed exclusively by section 14 of the Code and not barred until after ten years.
2. **Limitation of Actions: STATUTES: SECTIONS EQUALLY APPLICABLE: CONSTRUCTION.** Where different sections of the statute of limitations are equally applicable, the one allowing the longer period governs.

ERROR from the district court for Douglas county. Tried below before BAXTER, J. *Affirmed.*

A. S. Churchill, for plaintiff in error.

Arthur C. Wakeley, *contra.*

LOBINGIER, C.

This is an action on an appeal bond executed in order to perfect an appeal from the county to the district court. The bond was approved May 19, 1892, and this action was begun January 16, 1901, plaintiff claiming as assignee of the bond. Defendant first filed a motion to strike out certain averments of the petition and also to require a statement as to whether the assignment was in writing. This motion was denied and defendant then interposed a

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general demurrer which was likewise overruled and he, electing to stand thereon, has brought the case here by an error proceeding.

The question sought to be raised by the demurrer and the one principally discussed in the briefs, is the statute of limitations. Plaintiff in error contends that the action is governed by section 10 of the Code of Civil Procedure, which fixes the limitation as follows: "Within five years, an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment." On the other hand, defendant in error urges that this case falls within the terms of section 14 of the Code, which reads as follows: "An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or any other officer, or upon the bond or undertaking given in attachment, injunction, or in any case whatever required by statute, can only be brought within ten years."

It is conceded that the instrument sued on is one which, prior to the abolition of private seals, would have been termed a "specialty" and also that it is a "promise in writing," and to that extent the terms of section 10 are applicable. But on the other hand, the instrument is a "bond or undertaking * * * required by statute." Without it the appellant in that case could not have perfected an appeal, for the statute providing for a bond in such cases is both jurisdictional and mandatory. *Hier v. Anheuser-Busch Brewing Association*, 52 Neb., 144. The apparent contradiction between these two sections is of a character not uncommon in statutes providing for limitations. Indeed, there are other instances in our own statutes; a mortgage, *e. g.*, is an instrument which would formerly have been termed a specialty, and is also a promise in writing, and hence, if no other section of the Code were construed, a mortgage would be governed by the provisions of section 10. But section 6 expressly provides that it "shall be construed to apply also to mortgages." Again, section 14 above quoted, if considered alone, apparently includes the case of a guardian's bond. But section 32 of chapter 34,

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Compiled Statutes, provides: "No action shall be maintained against the sureties in any bond given by the guardian unless it be commenced within four years from the time when the guardian shall have been discharged." This section, though not a part of the Code, is evidently an amendment of section 14. In determining the period which bars a particular action, our task is to construe the various statutes together and to ascertain the one specifically applicable.

Counsel for plaintiff in error relies upon *Bobo v. Norton*, 10 Ohio St., 514, to support his contention that this case falls within section 10. That was an action upon a stay bond or recognizance which, like this, was a specialty. But the Ohio statute, then, as now, in force, provided the following limitation: "Within fifteen years: an action upon a specialty, or an agreement, contract, or promise in writing." 2 Bates' Annotated Ohio Statutes [3d ed.], section 4980. Another section provided: "An action upon the official bond or undertaking of an officer, assignee, trustee, executor, administrator, or guardian, or upon a bond or undertaking given in pursuance of a statute, can only be brought within ten years after the cause of action accrues." 2 Bates' Annotated Ohio Statutes [3d ed.], section 4984. In other words, the periods provided for by the two sections are proportionately reversed from the positions occupied in our statute, the shorter period being applied to statutory bonds and the longer to written contracts. In the case cited, the answer alleged that the action did not accrue within fifteen years and the case came up on demurrer to this answer. The averment as to time being admitted by the demurrer, the cause of action would clearly have been barred under either of the sections quoted. The precise question arising here was, therefore, not presented in the Ohio case. The court made no attempt to distinguish between the two sections for this was unnecessary. But this action would be barred if governed by section 10, but not if section 14 applies. In the Ohio case the court allowed the full benefit

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of the longer period, just as defendant in error is asking here and just as the court had, in the earlier case of *Davis v. Ford's Administrator*, Wright (Ohio), 200, allowed a suitor who had two remedies to avail himself of one though the other was barred.

It is contended, however, that section 14 should be construed as if it read "an action * * * upon the bond or undertaking given in attachment case, injunction case or any case whatever required by statute." But it seems to us that the word "case" is used in this section, not in its technical sense of "cause," but rather in the sense of "instance." The words attachment and injunction as used here are not adjectives but substantives and need not be followed by any other word. They are used in the same way that we speak of replevin or mandamus, and it is not necessary to employ the phrase, "a replevin case," or "a mandamus case." Indeed, in order that the section should read as contended for it would be necessary to supply, not only the word "case" after, but also the indefinite article before, so that the full phrase would be "an attachment case" or "an injunction case." We do not feel justified in supplying these words in order to give a different meaning when the section as it stands is complete and intelligible. Moreover, as counsel suggests, section 14 was probably taken from section 17 (4984) of the Ohio statutes, above quoted. It will be observed that the phrase there used is "a bond or undertaking given in pursuance of a statute." It is argued in plaintiff in error's brief that the meaning of these two sections is the same and that "there can be no distinction made between the legal effect of the two expressions." We think this is true, and for that reason we are unable to see how the word "case" as used in our statute can be construed as "cause" or "action." The Ohio statute would clearly include bonds given in any instance "in pursuance of a statute," and that, it seems to us, is what our own legislature intended to cover. In other words, we think section 14 was enacted in order to provide a special limitation for all statutory bonds, while

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section 10 was made to govern written instruments in general not otherwise provided for.

But if our view of this were incorrect and we should read the word "case" as though it were "action," we are unable to see how it could avail plaintiff in error, for the bond in controversy would still be a bond given in an action and required by statute. It is urged, however, that the words "like" or "similar" should be applied before case, and that the phrase should be then interpreted as if it read "attachment case, injunction case or any like case whatever required by statute." It is then argued that a distinction is to be made between bonds in attachment and injunction suits which are given in advance and appeal and stay bonds given to suspend the enforcement of a judgment. As we view it, the common purpose of all these bonds is to indemnify the adverse party, and the time of execution is immaterial. But whether such a distinction might be drawn or not we cannot supply in this section, the words necessary in order to enable it to be drawn. This would be judicial legislation.

It is urged that we must give effect to all the words in the section and that the use of the word "attachment" and "injunction" implies the exclusion of other actions, pursuant to the maxim, *expressio unius est exclusio alterius*. This might be pertinent if the words were not followed by any others, but we see no room for the application of this maxim when the statute expressly includes "any case whatever." Counsel asks why, if it was intended to include all statutory bonds, general terms were not employed which would clearly cover them. We are not called upon to defend or approve in all cases the phraseology of the statute makers, or to say that their words might not have been more happily chosen. It is enough for us to know that they have expressed themselves and to endeavor to ascertain their meaning. But we think that when the legislature employed the phrase "any case whatever" it did undertake and intend to include all statutory bonds, and that this phrase is parallel to the preceding one in the

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same section "any other officer." The latter has been held to include a bond of a treasurer (*Alexander v. Overton*, 22 Neb., 227; *Merriam v. Miller*, 22 Neb., 218) and of a county judge (*Chicago, B. & Q. R. Co. v. Philpott*, 56 Neb., 212). The fact that the legislature specifies attachment and injunction, no more indicates an intention to exclude other actions than does the mention of sheriff indicate an intention to exclude other officers.

But if it were true that statutory bonds were not exclusively governed by section 14, and were also subject to the provisions of section 10, the sustaining of the demurrer would still have been proper because the rule in such cases is to allow the longer period. This was illustrated in *Alexander v. Overton*, 22 Neb., 227, where an action upon a county treasurer's bond was sought to be included under section 11 of the Code. COBB, J., in writing the opinion, says:

"There doubtless is an apparent conflict between the provisions of the above two sections. But it will be readily seen that the provisions of section 11 are far more general and less specific than those of section 14, which quality would go far to indicate the latter as expressing the will of the legislature as to the points of apparent conflict. This, I think, would be true as to any statute, but more especially so in construing a statute of limitations, where the general clause would tend to limit and shorten the time clearly given by the more specific one."

So in reference to mortgages; while section 6 provides that it "shall be construed to apply also to mortgages," it does not in terms restrict such instruments to that section so as to exclude section 10. Yet this court has construed the section as applicable not only to mortgages but also to notes when secured by mortgages. *Hale v. Christy*, 8 Neb., 264, overruling by implication *Hurley v. Estes*, 6 Neb., 386.

After a careful investigation we can reach no other conclusion than that this action falls within the terms of section 14 exclusively. But if section 10 were equally appli-

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cable we should hold, nevertheless, that the longer period would govern.

There are some minor questions discussed in the briefs. It is claimed that the court erred in refusing to strike out certain matter from the petition. But even if these averments were unnecessary it is not shown that they were prejudicial, and under section 125 of the Code, the party making the motion must be "prejudiced thereby." So as to the ruling on the motion to require a statement as to whether the assignment of the judgment was in writing. Under section 124 of the Code, such a motion lies only as to the writing upon which the action is "founded," and this action is founded on the bond. The claim that the assignment might have been for collection only, seems to be answered by the averment "that plaintiff is now the owner and holder of said judgment."

We recommend that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

ZIMRI ELLIOTT ET AL., CONTESTANTS, v. THOMAS H. ELLIOTT
ET AL., PROPONENTS.

FILED DECEMBER 17, 1902. No. 12,415.

Commissioner's opinion. Department No. 1.

1. **Witnesses: COMPETENCY: PRIVILEGED COMMUNICATIONS: ATTORNEY AND CLIENT: STATUTES.** Section 333 of the Code prevents the giving in evidence, by a lawyer, only of confidential communications properly entrusted to him in his professional capacity.
2. **Witnesses: COMPETENCY: PRIVILEGED COMMUNICATIONS.** Communications not confidential in their character, and whose proof is necessary to effectuate the instrument, in preparing which the attorney was engaged, are not objectionable on this ground.
3. **Wills: SIGNATURE: EVIDENCE: SUFFICIENT.** Evidence in this case examined, and held to sufficiently show that the will in question was signed by the draftsman, in the testator's presence, at his previously made request.

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4. **Wills: INSTRUCTIONS: MENTAL INCAPACITY: UNDUE INFLUENCE: EVIDENCE INSUFFICIENT.** Evidence examined, and *held* to warrant the instruction given by the trial court that there was no evidence of mental incapacity on the part of the testator, or of undue influence on that of the beneficiaries under the will.

ERROR from the district court for Burt county. Tried below before FAWCETT, J. *Affirmed.*

Gillis & Bowes and H. E. Carter, for contestants.

W. G. Sears, contra.

HASTINGS, C.

July 11, 1900, a petition was filed in the district court for Burt county for the probate of the will of Jerry C. Elliott. The matter was pending in that court on appeal. The petition was filed by Thomas H. Elliott as proponent. Jerry E. Elliott died April 11, 1900, possessed of 120 acres of land, and some little personal property, of a total value of \$5,000, leaving surviving him sixteen children by three wives. The will first disinherited all his children except the four by his last wife. It then provided for a tombstone for himself and his last wife, and bequeathed the rest of his estate to his three sons and one daughter, the issue of his third marriage, and nominated Thomas H. Elliott, one of the sons, as executor. The other twelve children joined in the answer to the petition for probate. They denied the execution of the will; denied that the deceased's name was Jerry C. Elliott and alleged that it was Jeremiah C. Elliott; denied that he was at the time of its alleged execution of sufficient mental capacity to make a will and alleged that the will was not his voluntary act but was produced by undue influence; that he was and had been for many years weak in body and mind and by reason of physical and mental incapacity was unable to attend to any business; was subject to mental attacks that rendered him unable to move and destroyed consciousness; was kept from having any communications with his other children by the bene-

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ficiaries under the will; and that the will was the result of solicitations and undue influence on the part of the four beneficiaries. A reply denied generally all of these allegations; alleged that two of these contestants, in February, 1895, instituted proceedings to secure a guardian of the property and person of Jerry C. Elliott, and after due inquiry and full consideration the application was dismissed on the ground that the deceased was of sound mind and needed no guardian; that this was on March 4, 1895, and the will was executed on the 6th day of March of the same year. It is admitted that the full name of the deceased was Jeremiah C. Elliott, but that he was commonly known as Jerry C. Elliott. So much of the reply as sets out the guardianship proceedings was demurred to, and this demurrer was sustained. The issues were therefore, simply, the execution of the will; the capacity of the deceased to make it and undue influence on the part of the beneficiaries.

At the trial the jury were instructed that the execution of the will was duly shown and that there was no evidence that the testator was of unsound mind, or that the will was caused by reason of undue influence on the part of the legatees. From the judgment of probate, rendered after overruling a motion for a new trial, the contestants bring error.

The errors named in the brief and mentioned at the argument are, that there was evidence which should have been submitted to the jury as to the unsoundness of the testator's mind, and as to undue influence on the part of the legatees; that the lawful execution of the will was not shown and its admission to be read to the jury was error. Complaint was also made of the admission of the testimony of the witness Peterson, who drew the will, on the ground that he was attorney for Elliott in his lifetime and the will was made under his advice and his evidence is not competent under section 333 of the Code of Civil Procedure forbidding evidence by attorneys as to confidential professional communications.

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The last question probably should be considered first, as it first arose at the trial, and has to do with both the others. Mr. Peterson testifies that he knew the deceased from 1894 to 1898, and was frequently employed by him as attorney and was employed to draw the will. None of his testimony is objected to except the answer to interrogatory No. 15 of his deposition, as follows:

"What conversation, if any, did you have with Jerry C. Elliott at that time in reference to the drawing of the will? State fully.

"Ans. At that time Jerry C. Elliott and myself had a long conversation with reference to his children, and his family history in general, both in Nebraska and in Indiana, and we also talked quite freely about his financial condition at that time, and his feelings toward all of his children, and quite freely with reference to his desires as to the disposition of his estate. He said at that time as he had frequently told me, that he wished to bequeath his estate, both real and personal, to his younger children who were then living with him; he said that his older children who were not then living with him had tried for several years to get hold of what little property he had; he spoke of his sons Zimri and John particularly who had, for years, endeavored to get hold of his land and other property, and that when they had failed to get the land these two boys stayed away from his house and refused to aid him in any way during sickness or distress. He said that his son Robert was very good to him at times and at other times stayed away from him for quite a while; he said that he had received no care in his old age to amount to anything except from his younger children who were then living with him, and he also said that he thought that these younger children, whose names were inserted in the will, were entitled to what little he had left when he got through with it. He also said that some of the older children, whose names I do not now recall, had frequently told him that if he willed the property to the younger chil-

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dren, then living with him, they would contest the will on the ground that he had a weak mind and did not know what he was doing. He stated frequently at that time that he wanted me to understand all of the details of his case so that I would know just how he was situated and would be able to draw up a will that would stand in court. Being almost wholly blind and unable to read, Mr. Jerry C. Elliott requested me to sign his name to the will for him, which I did after reading it to him several times in the presence of the two witnesses whose names were attached to the will as subscribing witnesses. Mr. Jerry C. Elliott and myself at that time occupied two or three hours in the discussion of his affairs, and I am unable to state the whole conversation had at that time with him, but have already testified to the gist of what I now recollect, and my recollection of that conversation is quite clear for the reason that I was satisfied a contest would follow on account of the threats of the older children which he stated they had frequently made, and I questioned him very carefully and fully in order to satisfy myself whether or not Jerry C. Elliott was at the time competent to make his will, and whether or not there was any foundation for the threats which he said had been made by his older sons."

The objection made to this is "that the witness is incompetent to testify and it is irrelevant under the statute." The only ground of incompetency suggested is that the witness was at the time an attorney at law, had been frequently employed as such by the testator, and had been employed on that occasion to draft a will, and, as he testifies elsewhere, was asked by the testator to sign as an attesting witness. The objection was properly overruled. It certainly was not good as a whole. The statement that he was requested to sign it on the testator's behalf and that he did so after reading it over several times to the testator in the presence of the other two witnesses, was certainly not a "confidential communication properly entrusted" to the witness in his "professional

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capacity." It is not probable that any part of the conversation was in the nature of a confidential communication. It appears to have taken place for the most part in the presence of the other two witnesses and with no injunction of secrecy. In *Hills v. State*, 61 Neb., at page 595, it is said: "The mere fact that a communication is made to a person who is a lawyer, a doctor or a priest, does not of itself make such communication privileged. To have that effect, it must have been made in confidence of the relation and under such circumstances as to imply that it should forever remain a secret in the breast of the confidential adviser."

The next question raised in the record is over the admission in evidence of the will. It is earnestly claimed that the execution of the will was not proven and the case of *Murphy v. Hennessey*, 48 Neb., at page 612, is cited as controlling this one. It does not seem to do so. In that case there was no proof offered of any request for the signing of the testatrix' name to the draft of the will. In the present case, Mr. Peterson, who drew the will, testifies that he signed testator's name at the latter's request, and the other two witnesses, Shane and Brandt, testify to the same effect. Mr. Peterson's testimony has been given. Shane and Brandt both say that when the will was presented, ready for signing, the testator said to Mr. Peterson that the latter would have to write his name; that he then did so and the testator after that touched the pen while his mark was made. There is some objection on the ground that it does not distinctly appear that his name was written in the testator's presence, but the objection seems not well founded. It is clear, from the testimony of both Shane and Brandt, that the will was signed while all four of the parties were in the room. Mr. Shane says—after describing what had taken place with regard to the signing, and in response to the question, "Who were in the room at that time?"—"Mr. Brandt and Mr. Peterson, myself and Mr. Elliott." The whole circumstances of the signing as testified to by

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all of the witnesses indicate unmistakably that the signing of his name by Mr. Peterson was done in the presence of the testator. There was no error in the admission of the will in evidence.

It remains to consider whether the trial court was wrong in saying that there was no evidence of mental incapacity in the testator or of undue influence on the part of the beneficiaries under the will. So far as the question of undue influence is concerned, the only evidence claimed on the part of the counsel for contestants is the total disinheritation of his first two families of children, the leaving of the entire property to the four children who were living on the farm with the testator at the time of his death, and the slight evidence that some efforts were made to keep the older children from visiting the father in his last years. All of the testator's children were grown to manhood and womanhood at the time of his death. It would seem that the testator had expressed himself as intending to divide his property equally among his children until the year 1895. Just before this will was made, some of the older children became dissatisfied with the management of the farm in charge of the younger children, and attempted to have a guardian appointed for the person and property of their father. This seems to have angered him greatly, and to have been the cause of breaking off, to some degree, of friendly relations between the father and the older children, but such relations were not wholly suspended. They seem to have visited their father before his death. Friendly relations with two daughters of the second wife seem never to have been interrupted. The will, as before stated, was made in 1895, immediately after the dismissal of the guardianship proceedings, something more than five years before the testator's death. There is no proof of any solicitation or efforts on the part of the beneficiaries to procure the execution of the will and no presumption can be allowed against it from the mere fact that the whole of this small property is left to the last family of children.

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So far as the question of mental incapacity is concerned there is no proof submitted except to the fact that the testator was old and weak and almost totally blind. That his mental faculties, aside from such weakness as grew out of these infirmities, were sound and clear, seems entirely certain. There is no evidence in this record to impeach or contradict that of the subscribing witnesses as to his mental condition, and that the terms of the will were directed by himself, with the full capacity to recall the items of his property and his children by each wife. It is not thought that the trial court committed any error in saying that there was no proof either of mental unsoundness or of undue influence.

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

AFFIRMED.

COMMERCIAL STATE BANK OF CRAWFORD, APPELLANT, v.
WILLIAM H. KETCHAM ET AL., APPELLEES.

FILED DECEMBER 17, 1902. No. 12,862.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error: LAW OF THE CASE: ADJUDICATED QUESTIONS:**
INJUNCTION. Where the defendants appeal from a decree in favor of the plaintiff, allowing an injunction, which is contingent on the doing of certain acts by the plaintiff, and the decree is affirmed in this court, such decree is conclusive on the parties as to all matters thereby adjudicated, on an appeal from a subsequent order in the same case.
2. **Injunction: ALLOWED BY COUNTY JUDGE: VALIDITY.** Where, in the absence of the district judge and of the judges of the supreme court, a petition for an injunction is presented to the county judge, and a temporary injunction allowed by him, and the petition and the order of the county judge forthwith filed in the district court, the injunction is not void on the ground that the order therefor was made before the action was commenced.
3. **Payment: DECREE CONTINGENT ON: PART OVERLOOKED AS TO COSTS:**
TENDER: ACCEPTANCE. Where, on a motion to make a decree ab-

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solute, which was contingent on the payment by the plaintiff of a certain sum and the costs in a certain action, it appeared that the plaintiff had complied with the decree on his part, save that through oversight he had omitted to pay a small item of costs which he thereupon tendered, the tender should have been accepted and the rule granted.

4. **Injunction Against Sale:** EVIDENCE INSUFFICIENT. "Evidence examined, and *held* not to sustain the finding that the defendants were unable to comply with the terms of the decree.

APPEAL from the district court for Dawes county. Tried below before HARRINGTON, J. *Reversed with directions.*

Albert W. Crites, for appellant.

Allen G. Fisher, contra.

ALBERT, C.

This action was brought by the Commercial State Bank of Crawford, against William H. Ketcham and others, to restrain the sale of certain personal property under an execution issued on a judgment rendered in a certain action of replevin, in which the plaintiff herein was defendant and William H. Ketcham, one of the defendants herein, was plaintiff. The court, after a hearing on the merits, entered a decree in these words:

"It is therefore the judgment, order and decree of the court, that upon the plaintiff paying to the clerk of said court the sum of \$108.95 with seven per cent. interest thereon from the 26th day of February, 1896, within twenty days, together with the costs of said replevin action, then that said injunction heretofore granted may, and is hereby made perpetual, and that upon such payment the sheriff shall deliver to plaintiff the warrants levied upon by him. That upon its failure so to do within said time, then that said property levied upon, shall be by the sheriff of said county, sold, for the purpose of realizing said sum."

From this decree the defendants appealed to this court.

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On the 19th day of June, 1901, POUND, C., filed an opinion in the case, recommending the affirmance of the decree. The opinion was approved by the court and the decree was affirmed. The facts sufficiently appear in that opinion, which is reported in 1 Neb. [Unof.], 454. Other facts bearing on the case may be found in *Commercial State Bank of Crawford v. Ketcham*, 46 Neb., 568, which is part of the same controversy now before the court.

On the 11th day of June, 1902, the plaintiff filed a motion in the district court, asking, in effect, that the decree of the district court be made absolute as to the defendants, of which the defendants had due notice. A hearing was had, upon which it was established that the plaintiff had complied with the requirements of the decree on its part, except as to an item of \$1.70 of the costs in the replevin case, which, through inadvertence, it had omitted to pay. A tender of this amount was made at the hearing. For the purpose of showing their inability to comply with the decree on their part, the defendants showed that, within twenty days from the dissolution of the temporary injunction, and before the bond was given to keep such injunction in force until the final hearing on the merits, the defendant, Samuel A. Bryant, as deputy sheriff, sold the property in controversy on the execution issued on the replevin judgment, to the defendant Ketcham, the execution plaintiff. The court found that \$1.70 of the costs in the action of replevin had not been paid, and that the defendants could not comply with the requirements of the decree on their part and denied the motion. From the order denying the motion the plaintiff appeals to this court.

On the 23d day of September, 1902, and more than a year after the affirmance of the decree on the merits by this court, the defendant Fisher filed in the present case what is denominated a cross-petition in error, assailing the decree and now, for reasons which are not clear to us, insists that the present appeal reopens the entire controversy.

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So far as the "cross-petition in error" is concerned it will suffice to say that the party presenting it was a party to the appeal from the decree thereby assailed, and, whatever its merits or demerits, it is final and conclusive on all the parties as to all matters thereby adjudicated.

The defendants insist that the motion was properly denied because the county judge granted the temporary injunction before the action was commenced. The record shows that the injunction was granted on the same day the petition was filed in the district court. The only evidence we have that it was granted before the petition was filed is that the record shows that both were filed at the same time. It is true, section 252 of the Code of Civil Procedure provides that "The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment," but this section, like all others, should be given a reasonable construction. So far as appears from the record, the plaintiff presented its petition to the county judge, procured the order and forthwith filed both in the district court. Under such circumstances, to hold that the injunction was granted before the action was commenced, instead of at the time it was commenced, would be technical almost to the point of absurdity. The temporary injunction was valid. After its dissolution it was kept in force until the final hearing on the merits by a bond, the sufficiency of which was not challenged by a motion to strike or otherwise at the time; within the time allowed by law for filing such bond the alleged sale was made; it was therefore made in contempt of the temporary injunction then in force. Besides, the sale was between parties to the suit who were before the court at the hearing of the motion under consideration; it does not appear that the property had passed from the possession of the purchaser. That being true, the finding of the court that the defendants were unable to comply with the decree is wholly unwarranted.

So far as the plaintiff's failure to pay the \$1.70 costs is concerned, where substantial interests are involved, if

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it can be prevented, trifles should not be permitted to stand in the way of justice. Plaintiff should have been permitted to pay the amount instanter, and the relief asked by the motion should have been granted.

It is therefore recommended that the order denying the motion be reversed and the cause remanded with directions to the district court that, upon the payment of the sum of \$1.70, the balance due on the costs in the action of replevin, within twenty days from the filing of the mandate issued herein, an order be entered making the decree heretofore entered in this cause absolute as to the defendants, and that the cross-petition in error be dismissed.

AMES and DUFFIE, CC., concur.

The order of the district court is reversed and the cause remanded with directions to the district court, upon the payment of the sum of \$1.70 into court by the plaintiff, to be applied on the costs in the action of replevin, within twenty days from the filing of the mandate issued herein, to enter an order making the decree heretofore entered in this cause absolute as to the defendants, and the cross-petition in error filed herein is dismissed.

REVERSED WITH DIRECTIONS.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1903.

PRESENT:

HON. J. J. SULLIVAN, CHIEF JUSTICE.
HON. SILAS A. HOLCOMB,
HON. SAMUEL H. SEDGWICK, } JUDGES

DEPARTMENT No. 1.

HON. WILLIAM G. HASTINGS,
HON. CHARLES S. LOBINGIER,
HON. JOHN S. KIRKPATRICK,

DEPARTMENT No. 2.

HON. JOHN B. BARNES,
HON. WILLIS D. OLDHAM,
HON. BOSCOE POUND,

DEPARTMENT No. 3.

HON. EDWARD R. DUFFIE
HON. JOHN H. AMES,
HON. I. L. ALBERT,

} COMMISSIONERS.

GRAND LODGE ANCIENT ORDER OF UNITED WORKMEN OF
NEBRASKA ET AL. V. ALICE SCOTT.

FILED JANUARY 8, 1903. No. 11,828.

Commissioner's opinion. Department No. 1.

1. **Beneficial Associations: INSURANCE: PLEADING: EVIDENCE NOT PRESERVED: PRESUMPTION: STATUTES.** Where a plaintiff's allegations in a petition to open up a judgment for fraud of the successful party in obtaining it, filed under section 602 of the Code, are sufficient, and the evidence taken at the hearing is not pre-

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served, the action of the trial court in setting aside the judgment and granting a new trial will be presumed to have been on sufficient evidence.

2. **Beneficial Associations: INSURANCE: SUSPENSION UNAUTHORIZED: WAIVER.** The evidence in this case showing an unauthorized suspension of the insured in 1893, but also showing that under a change of constitution, January 1, 1894, by which \$1 became payable monthly without notice on penalty of suspension and forfeiture if such payment was not made, and that eleven months elapsed under this constitution without any attempt to comply with it on assured's part before his death, *held*, that his rights were forfeited and there could be no recovery by his beneficiary.

ERROR from the district court for Holt county. Tried below before KINKAID, J. *Reversed.*

James W. Carr and Matthew Gering, for plaintiffs in error.

H. M. Uttley, contra.

DAY, C.

This action was brought in the district court for Holt county by Alice Scott against the Grand Lodge of the Ancient Order of the United Workmen of Nebraska, to recover upon a beneficiary certificate issued by the defendant to Barrett Scott, the husband of the plaintiff. Upon the issues tendered by the pleadings a trial was had to a jury resulting in a verdict in favor of the plaintiff for the amount called for by the certificate, with interest, upon which judgment was subsequently entered. To review this judgment the defendant has brought error to this court.

One of the errors complained of is the granting of a new trial upon the plaintiff's petition for a new trial filed August 6, 1898. It appears that a trial had been previously had to the court resulting in a judgment in favor of the defendant on June 19, 1897. Upon a hearing on November 11, 1898, this judgment was set aside by the court. The evidence taken at this hearing is not

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preserved in the bill of exceptions and the presumption must be indulged that the action of the trial court in awarding a new trial was based upon sufficient testimony. The only question still open in regard to this new trial is whether the allegations of the petition on which it was granted are sufficient to support the order. We think they are. It is shown that the defendant asked that plaintiff be required to set up a copy of the defendant's constitution and by-laws. For the purpose of complying with this request the plaintiff asked of defendant and was furnished a copy thereof by one of the defendant's attorneys. The petition also alleged that plaintiff expressly inquired if any changes had been made in the constitution or by-laws and was informed that there had been no material changes since the issuance of the benefit certificate in question. The plaintiff alleges that she relied upon this statement and went to trial; that in truth and in fact a change had been made in the constitution of the defendant order to become effective January 1, 1894, so that it appeared from the copy set out in the petition that the grand recorder was only required to notify subordinate lodges of death losses. It also alleged that under the constitution as it existed in 1893, when it is claimed the certificate was forfeited for non-payment of assessments, the grand recorder was required to notify members of subordinate lodges as to the death losses and the necessity of an assessment. The by-laws are alleged to have provided that this notice from the grand recorder shall constitute an assessment. It is also alleged that under the constitution as it existed in 1893, there were no valid assessments and so there could have been no forfeiture.

Section 602 of the Code of Civil Procedure provides: "A district court shall have power to vacate or modify its own judgments or orders, after the term at which such judgment or order was made: * * * (Fourth.) For fraud practiced by the successful party in obtaining the judgment or order."

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The allegations in the petition seem sufficient to authorize the court to set the judgment aside under the provisions of the above quoted section.

It is also urged that the judgment is not sustained by the evidence. The record shows that the defendant is a voluntary fraternal, beneficial association, organized upon the lodge system with authority to do business in this state; that O'Neill Lodge No. 58 is a subordinate lodge under the authority and jurisdiction of the Grand Lodge; that in addition to the fraternal and social features of the organization, it also undertakes, under certain conditions, to furnish indemnity in case of death of its members.

In his lifetime Barrett Scott became a member of the defendant association, and on March 25, 1891, there was issued to him a beneficiary certificate whereby defendant agreed in case of his death to pay to Alice Scott, his wife, \$2,000, upon the express condition "that said Barrett Scott shall in every particular while a member of this order, comply with all the laws, rules and regulations thereof." At the time Mr. Scott became a member and until January 1, 1894, the rules and regulations of the defendant association prescribed the manner of making assessments and the giving of notice thereof to its members, as follows:

"The issue of the notice of assessment by the grand recorder, as provided for in the constitution and by-laws of this Grand Lodge shall constitute the making of an assessment of one dollar, which must be paid to the lodge by each member holding a certificate or having received the W. degree, provided, such member has received his certificate or W. degree prior to the date of the death on which the assessment is made. Written or printed notices shall be sent through the mail or delivered in person by the financier, not later than the 8th day of the month in which notice was issued by the grand recorder."

At a meeting of the Grand Lodge held in May, 1893, the above provision was entirely abrogated and in lieu thereof a rule was adopted which became operative January 1, 1894, as follows:

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"There shall be due as a regular assessment without notice, on the first day of each month, from each Workman degree member in good standing of this jurisdiction, the sum of one dollar, payable to the financier of this lodge on or before the 28th day of the month, provided, if there is no assessment for the month, or if there be two or more assessments for that month, notice thereof shall be published in the official organ of the order, or in such other manner as the Grand Lodge shall prescribe."

The constitution of the defendant organization provides that "the certificate of each member who has not paid such assessment on or before the 28th day of said month, shall by the fact of such non-payment, stand suspended, and no action upon the part of the lodge or any officer thereof shall be required as essential to such suspension."

The record shows that during the month of June, 1893, Scott deposited with the financial secretary of the local lodge, whose duty it was to collect the assessments, the sum of \$5 to be applied in payment of future dues and assessments, and upon September 1, 1893, there was remaining of said sum in the hands of the financial secretary the sum of \$3.25. It also appears that in August, 1893, Scott absconded from the county in which he was living and his whereabouts were unknown until October 10, 1893. In September, 1893, the financier of the local lodge, acting under the direction of the officers of the Grand Lodge, returned to Mrs. Scott the balance in his hands, to wit, the sum of \$3.25; which sum she accepted and receipted for. There is a dispute in the testimony as to her executing a receipt for the money; but that she received the money does not seem to be denied. It seems that this action was taken by the lodge purposely so that Scott would be suspended from his membership rather than to prefer charges against him and have him expelled on account of the criminal charges pending against him.

In August, 1893, a relief call was regularly made, which under the rules became due and payable September 28. The assessment upon this call was not paid by the assured,

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and in fact, no notice of its having been made was ever given to him and for failure to collect payment thereof he was suspended and the financier so reported him to the grand recorder. The testimony shows that Scott continued to reside at O'Neill, Nebraska, until December 30, 1894, when he was waylaid and killed. No effort had been made by him to become reinstated in the lodge and his being dropped from the roll of membership seems to have been acquiesced in by all of the parties in interest.

In our view, the returning of the money in the hands of the financier of the local lodge to Mrs. Scott, was absolutely unauthorized, and the so-called suspension based upon the non-payment of the August assessment was illegal and void. The money had been deposited for a specific purpose and it was a misappropriation of it to apply it in any other way without the direction of the insured. Had Barrett Scott died before the assessments levied against him amounted to \$3.25, it seems clear that defendant would have been liable, notwithstanding the so-called suspension; but after January 1, 1894, to December 30, eleven assessments were made under the provisions of the constitution, none of which the insured paid or made any offer to pay. It is probably true that because of the failure of the defendant to give the insured proper notice of assessments made after August, 1893, to January 1, 1894, that defendant would not have had the right to appropriate any part of the money in its hands to the payment of assessments made prior to January 1, 1894. But this fact is of little avail to the plaintiff in the light of this record. After January 1, 1894, eleven assessments of one dollar each were made under the provisions of the new constitution, under which notice to the members was not necessary, so that in any event, Scott would have become suspended in May for the non-payment of his April dues.

The plaintiff can not be heard to say that the insured failed to pay the assessments because he was suspended and at the same time claim benefits of full membership

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because the suspension was illegal. Under the undisputed facts in relation to the non-payment of the assessments and dues, it seems to us clear that Scott's non-compliance with the rules and regulations had forfeited his membership in the order and that the judgment should have been directed in favor of the defendant.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

Opinion on rehearing follows.

GRAND LODGE ANCIENT ORDER OF UNITED WORKMEN OF
NEBRASKA ET AL. V. ALICE SCOTT.

FILED DECEMBER 2, 1903. No. 11,828.

Commissioner's opinion. Department No. 3.

1. **Beneficial Associations: INSURANCE: ASSESSMENTS: PAYMENT IN ADVANCE: SUSPENSION.** A member of a beneficial association in good standing deposited with the financier of his local lodge a sum of money sufficient to pay his assessments and dues for several months in advance. The financier accepted the money, agreeing so to apply it. The member then left the town of his residence, and during his absence the financier returned the money so deposited, less one assessment, to the beneficiary named in the member's certificate, and thereupon the member was marked suspended for failure to pay the next regular assessment. *Held*, that the suspension was unauthorized and void.
2. **Beneficial Associations: INSURANCE: FORFEITURE: ASSESSMENTS: RIGHT TO RECEIVE IN ADVANCE.** Where the financier of a lodge has accepted on deposit a sum of money from a member to cover anticipated assessments, agreeing so to apply it, a forfeiture can not be predicated upon the failure of the member personally to tender the amount of an assessment when due, if the financier has money in his hands to meet the assessment; and it is imma-

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terial that the duties of his office did not require him to receive money for assessments before they were payable, if in doing so he has not contravened any positive law of the organization.

3. **Beneficial Associations: SUSPENSION ILLEGAL: CONTINUATION OF MEMBERSHIP.** One who is illegally suspended from a beneficial association may treat the suspension as illegal and void, his membership continuing, if he does not acquiesce in and consent to the illegal suspension, and he need not seek reinstatement.
4. **Beneficial Associations: SUSPENSION ILLEGAL: TENDER OF SUBSEQUENT DUES.** A forfeiture can not be predicated upon an omission of one party brought about by the conduct of the other party; so that where a member has been illegally suspended from a beneficial association and dues tendered by him are refused, the grounds for the refusal being continuous in their nature, his failure thereafter to tender dues can not be made the basis of a forfeiture until after notice of a readiness to receive the dues has been brought home to the suspended member.
5. **Beneficial Associations: SUSPENSION ILLEGAL: CONSENT: EVIDENCE: INSUFFICIENT.** While a member of a beneficial association who is illegally suspended may acquiesce in and consent to the suspension, so as to forfeit his rights under a benefit certificate, the evidence in this case is examined and *held* not to warrant an inference that the suspended member acquiesced in or consented to the illegal suspension.
6. **Beneficial Associations: FORMER DECISION.** Former decision rendered in this case (*Grand Lodge, Ancient Order of United Workmen v. Scott, ante*, page 845, 93 N. W. Rep., 190) not adhered to.

REHEARING of case reported *ante*, page 845.

ERROR from the district court for Holt county. Tried below before KINKAID, J. *Judgment below affirmed.*

James W. Carr and Matthew Gering, for plaintiffs in error.

H. M. Uttley, contra.

KIRKPATRICK, C.

This action was instituted by plaintiff, Alice Scott, in the district court for Holt county, to recover upon a benefit certificate held by her husband, Barrett Scott, in defendant, the Grand Lodge of the Ancient Order of United

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Workmen. There was judgment for plaintiff, and the case is presented to this court upon petition in error. At a former hearing, an opinion in this case was filed reversing the judgment. *Grand Lodge Ancient Order of United Workmen of Nebraska v. Scott*, ante, page 845, 93 N. W. Rep., 190. Upon the application of plaintiff, a rehearing has been granted, and the cause is again open for consideration on the merits.

It will be convenient in the outset briefly to restate the facts. Plaintiff, in her amended petition, alleged that she was the widow of Barrett Scott, who prior to his death was a member of O'Neill Lodge No. 153, Ancient Order United Workmen; that in March, 1891, the defendant had issued to Scott a beneficiary certificate, agreeing to pay plaintiff upon her husband's death the sum of \$2,000; that due notice was given to defendant of Scott's death; that during his lifetime he paid all dues and assessments legally and regularly levied against him as a member of defendant order, and that the certificate was in full force and effect at the time of his death; there was prayer for judgment in the sum of \$2,000 with interest. The defendant in its answer admitted that Scott became a member of the defendant order March 25, 1891, but that he failed to pay relief call No. 13, which had been levied by the supreme lodge and became due and payable September 1, 1893, and after due notice, because of such failure, he was suspended, according to the laws and the constitution governing the order, to which Scott had agreed upon becoming a member, as set out and alleged in defendant's answer. It was also alleged in the answer that section 4, article 7 of the constitution of defendant order, was amended, the amendment being promulgated and in full force and effect from and after January 1, 1894, providing that there should be due as a regular assessment on the first day of each month, without notice, the sum of one dollar, payable to the financier on or before the 28th day of the month; that pursuant to the provisions of the constitution, so amended, assessments were duly and reg-

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ularly levied upon the membership of defendant, and notices thereof were published in the official organ of the order, but that Scott failed and refused to pay such assessments although well knowing that such failure would result in his suspension, and that had he been in good standing on the 1st day of January, 1894, he would have been liable to the assessments levied from and after that date; but having failed to pay the assessments between September 1, 1893, and January 1, 1894, he would again have become suspended for failure to pay the assessments due after January 1, 1894. In her reply, plaintiff pleaded that the so-called suspension on the 29th day of September, 1893, was wrongful, illegal and improper, and that by reason thereof the certificate remained in full force and legal effect until Scott's death.

The evidence shows that Scott became a member in good standing of defendant order March 25, 1891. Relief call No. 13 was levied on September 1, 1893, and became due and payable on the 28th day of that month, and thereafter became delinquent. It further appears that in the early part of August, 1893, Scott left the city of his residence, O'Neill, having prior to that time paid into the hands of the financier of the local lodge the sum of about \$5 to apply on his assessments as they became due. Out of this sum the financier, according to the directions of Scott, paid the August assessment. Scott remained away from O'Neill until October 10, 1893, when he was returned to O'Neill by the sheriff of Holt county, and he remained there until December 31, 1894, when he was waylaid and killed by a band of assassins. It seems that after his departure from O'Neill, the matter of whether or not he should be retained as a member of the lodge was discussed by the local lodge at its regular meeting. It does not appear that any definite action was taken, but it does appear that the money deposited with the financier by Scott before leaving, less the August assessment, was either returned, or attempted to be returned to plaintiff; or, at all events, it was not applied for the purpose for

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which it was left, and Scott was accordingly marked suspended on the books of the lodge for non-payment of assessment for September, 1893. Under this state of facts, it was concluded on the former hearing that the suspension was illegal and void. With this determination we are at present content. Under none of the terms of Scott's contract with defendant order that has been called to our attention, could such action be construed to be legal or authorized. It appears from the record to have been Scott's custom from time to time to leave sums of money in the hands of the local financier for application on his assessments when they fell due, and this custom was acquiesced in and acted upon by the financier. His failure to apply the money in his hands on September 1, 1893, as Scott directed was an act for which Scott could not be legally responsible. The funds were misappropriated, and the attempted suspension upon the alleged ground of failure to pay the assessment must be held unavailing.

If he was illegally suspended in September, 1893, what were his rights in the premises? Manifestly, he could waive the illegality of the suspension, and apply for reinstatement in the manner prescribed by the laws of the defendant order for the reinstatement of suspended members. But in view of the circumstances leading up to his suspension, Scott for obvious reasons might have hesitated to assume the risks attending this method of obtaining relief from the action of the local lodge in dropping him from the membership. He might have appealed to the courts, in a proper proceeding, either to obtain its process to compel the order to reinstate him, or have his status judicially determined and declared. But however that may be, or whatever other recourse was open to him, it is clear to us that if the expulsion of Scott was wholly void and unauthorized, he was at liberty to treat it as such, and after being satisfied that further tender of dues and assessments would be wholly nugatory because of the resolution of the order to refuse them, his membership would continue, notwithstanding he ceased to make tenders at stated intervals or upon the first of each month.

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In our opinion it is quite immaterial whether the financier of the local lodge was authorized to receive money from members to apply on dues or assessments before the same were due. The fact in the case at bar is that the financier did receive a large sum of money from Scott, a sum sufficient to pay his assessments for several months, and received it under an agreement and understanding so to apply it. Having done so, it was too late subsequently, and in the absence of Scott, to refuse to apply the money as he agreed. We have, then, this situation: an illegal suspension September 28, 1893, and a tender of the dues payable thereafter regularly by the suspended member up to January 1, 1894, and a refusal thereof by the lodge. It is difficult to conceive what more could have been demanded of Scott. The law does not require the ceaseless repetition of a useless act, in order to preserve one's rights. In *Hoeffner v. Grand Lodge of German Order of Harugari*, 41 Mo. App., at page 360, it is said: "If a judgment for the expulsion of a member is void because rendered in an unauthorized manner, and the member treats it as invalid, his membership continues, and he need not seek reinstatement." It is clear to us, and seems to be conceded, that if Scott had died between September, 1893, and January 1, 1894, plaintiff could have recovered against defendant.

But upon the fact that Scott did not die until December 31, 1894, some fifteen months after his suspension, during which time he made no tender of dues, or any effort at reinstatement, the contention seems to be based that plaintiff can not recover. The argument in support of this contention is that even if Scott's membership continued in force as long as the sum deposited by him with the financier would have paid his dues and assessments, which it seems would have been until about January 1, 1894, thereafter, under the amended constitution dues became payable without notice, and suspension resulted from the mere fact of non-payment, and Scott, being in default on that day and for many months thereafter, at once stood

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suspended. Upon consideration, we must hold this contention without substantial merit. From the record it is altogether apparent that the officers of defendant order regarded Scott as suspended from and after September 28, 1893. At no time thereafter, without reinstatement in regular order, would they have received any money from him in payment of any dues or assessments. This fact must have been as apparent to Scott as it was to the officers of defendant. The refusal by the lodge of the dues tendered after September, 1893, was upon grounds in their nature continuous. The provision in his contract by which Scott was obliged to tender the sums needed to meet the assessments, and all similar provisions, are upon the assumption that if seasonably offered there will be a readiness on the part of the order or association to which they are payable to receive them. Where, by a decision once had, it is notoriously declared that the member is suspended, and dues from him will no longer be accepted, the failure thereafter to tender them can not constitute a waiver of any rights until notice of a change in the attitude of the order is brought home to the suspended member. To hold that Scott was suspended for failure to pay assessments due subsequent to the expiration of the period covered by the deposit made by him would be to redate the suspension in order to make legal what was illegal. The defendant relied as a defense upon the legality of the suspension of September, 1893. A forfeiture in this case can not be based upon a failure on the part of Scott to tender assessments payable to January 1, 1894.

In their brief counsel conceded that if, after the deposit made by Scott had been exhausted, and after the advent of the year 1894, when the amended constitution became effective, Scott had made one tender of the assessment then due, further tenders would have been unnecessary, and cite several cases (*March v. Supreme Lodge*, 29 Fed. Rep., 896; *McKee v. The Phœnix Ins. Co.*, 28 Mo., 383; *Meyer v. Knickerbocker Life Ins. Co.*, 73 N. Y., 528), but we can not see that they sustain the contention. Assum-

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ing that Scott knew, or was charged with notice of the provision in the amended constitution that an assessment of one dollar was due on the first day of each month after January 1, 1894, without notice, and that failure of any member or his failure to pay such assessment would result in suspension without any action on the part of defendant or any of its officers, what was there in this knowledge that would carry any intimation to him that a tender on January 1, 1894, would have been accepted? He, at that time, had already been declared suspended by the defendant. The attitude of the defendant toward him was fixed and determined, and had been for several months, the assessments payable in which had been declined. The only material difference between the law of 1893, and the law of 1894, touching the subject of assessments, was that in the former a valid and regular assessment depended upon due notice to the member, unless such notice were waived; whereas in the latter, the assessment became due and payable without notice, and upon failure to pay the member stood suspended. This distinction could not have had any bearing upon the fixed attitude of the defendant toward Scott, and its determination, already manifested, to refuse tendered assessments. We see no reason for holding that after the exhaustion of the deposit Scott should have made a tender of at least one of the assessments payable subsequent to January 1, 1894. *Guetzkow v. The Michigan Mutual Life Ins. Co.*, 105 Wis., 448. In the case cited it is said: "The rule of law is maintained with great unanimity that one party can not predicate a forfeiture upon an omission by the other which his own conduct has helped to bring about; that the declaration that a policy of insurance is already forfeited will constitute a sufficient justification for the omission to tender subsequently accruing premiums and installments, upon the ground that the assured is justified in believing that no tender would be accepted, and the formality is therefore unnecessary."

We adopt the rule announced in the case quoted from, and it is sufficient to dispose of the contention that Scott's

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membership was forfeited by reason of his failure to pay or tender payment of assessments at any time after January, 1894.

Again, it is said that Scott, upon his return to O'Neill in October, 1893, became aware of his suspension, and remained cognizant of that fact up to the date of his death, making no attempt at reinstatement. From this we are asked to deduce an acquiescence on his part in the action of the lodge, such as now estops plaintiff from urging the illegality of the suspension of September, 1893. We do not undertake to say that the beneficiary of an illegally suspended member can in every event recover the death benefit, without reference to the conduct of the deceased subsequent to his suspension. It is easily conceivable that such member might acquiesce therein, treat the suspension as valid, and during the remainder of his life demean himself in a manner wholly inconsistent with any belief on his part that he was still a member or entitled to membership, so as to prevent a recovery. Such seems to have been the holding in a case decided by the supreme court of Missouri, where the member had been expelled upon a charge upon which the lodge had no jurisdiction to try him, being expelled at a time when there were unpaid and delinquent assessments against him, of which subsequent to his suspension he made no tender. *Glarson v. Supreme Lodge Knights of Pythias*, 50 Mo. App., 45. But in the case at bar, as already indicated, Scott must be regarded as having tendered all dues and assessments up to the date of his suspension, as well as for several months thereafter, and we are of opinion that more than this was not required of him.

In the prior opinion it was stated that the plaintiff can not be heard to say that the insured failed to pay the assessments because he was suspended, and at the same time claim the benefit of full membership because the suspension was illegal. In this language, say counsel for defendant, the precise and salient feature of this case finds logical expression. Upon careful reconsideration of this

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question, we have been led to a contrary view. We do not believe that the two positions are essentially antagonistic. We have already concluded herein, both upon authority and reason, that forfeiture could not be predicated upon his failure to tender assessments after the refusal by the defendant of repeated tenders made subsequent to the void and illegal suspension. And if his failure to tender the assessments was justified, the plaintiff can not be held to have been prejudiced by such failure. It is conceded that his suspension of September, 1893, was illegal and unauthorized, and it is contended that by reason of this fact he was required to pay all assessments up to the day of his death in order to enable the plaintiff to succeed in this action. On the contrary, tendered assessments were refused, upon grounds warranting the belief that all future tenders would meet with the same fate. The failure to tender the assessments upon which the forfeiture is sought to be based was justified, and the suspension being void, the membership of the insured continued.

In the prior opinion, it was also stated that it was probably true that because of the failure of the defendant to give the insured the proper notice of assessments made after August, 1893, to January 1, 1894, the defendant would not have had the right to appropriate any part of the money in its hands to the payment of assessments made prior to January 1, 1894. We have treated this case upon a contrary assumption, namely, that it was not only a right but a duty of defendant to apply the money in its hands to the assessments as they came due after August, 1893, as far as those funds would apply, without reference to the notice required by the laws of defendant in force prior to the amendment thereof which became effective in 1894; and we have done this upon the theory that such notice could be waived, and was waived and clearly intended to be waived by Scott.

It appears that two trials were had of this action in the lower court, the first resulting in a verdict and judgment

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for defendant. Upon application of plaintiff this judgment was set aside and a new trial granted, resulting in the judgment now under review. Upon the action of the trial court in granting a new trial error is predicated, and with the ruling on this point, as announced in the first paragraph of the syllabus of the prior opinion, we are content, and the same is adhered to. Other propositions advanced and argued by both parties do not require consideration.

It follows that so much of the opinion heretofore rendered in this case as leads to a reversal of the judgment of the lower court be not adhered to, and it is recommended that the judgment of reversal be vacated, and the judgment of the district court be affirmed.

DUFFIE, C., concurs.

JUDGMENT BELOW AFFIRMED.

THOMAS MURRAY, APPELLANT, v. THE MUTUAL BENEFIT
LIFE INSURANCE COMPANY OF NEWARK, NEW JERSEY,
ET AL., APPELLEES.

FILED JANUARY 8, 1903. No. 11,941.

Commissioner's opinion. Department No. 1.

Mortgages: FORECLOSURE: CONFIRMATION BY CONSENT: REDEMPTION AFTER TIME LIMITED. Where sale of mortgaged premises under foreclosure has been confirmed, a setting aside of such confirmation, the entry of another by consent, the making and deposit with the clerk of the foreclosing court of master commissioner's deed based on the sale and last confirmation, and quitclaim deed of defendant, both running to plaintiff, with a stipulation of parties that deeds are to be held till May 1, following, control of property in meanwhile to be in a third party, who is to collect rents, pay taxes and insurance out of them, and the rest to plaintiff, and that if by May 1 the decree is paid, the deeds are to be destroyed and the rent meanwhile received by plaintiff paid to defendant, such facts do not show that the decree of foreclosure was set aside by mutual agreement, nor entitle defendant to redeem after May 1, and after delivery to plaintiff of the deeds in accordance with the stipulation.

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APPEAL from the district court for Douglas county.
Tried below before DICKINSON, J. *Affirmed.*

I. J. Dunn, for appellant.

• *Switzler & St. Clair*, contra.

HASTINGS, C.

This is an appeal from the sustaining of a demurrer to the plaintiff's petition and the dismissing of his action. The sole question presented is whether or not the facts set out in regard to the adjustment of a sale under a foreclosure decree in the federal court was a new mortgage or a final disposition of plaintiff's rights in the mortgaged premises.

The defendant, The Mutual Benefit Life Insurance Company of Newark, New Jersey, had obtained a decree for \$60,570.81 against plaintiff in the federal court and for sale of real estate for its payment. At the foreclosure sale said defendant purchased the property. Plaintiff made objections to the appraisement and to the sale which were overruled. The sale was confirmed and in May, 1898, plaintiff was about to take an appeal from the order of confirmation. Instead of such appeal, the parties agreed that the order of confirmation should be set aside another order of confirmation entered by agreement; a deed to the property should be made by the master commissioner, and delivered to O. B. Hillis, clerk of the federal court, together with a quitclaim deed of the plaintiff Murray; both deeds to be held until May 1, 1899; at that time, if certain payments aggregating \$10,000 had been made by the lessor of the property into the hands of H. A. Yates, and if plaintiff should pay the amount due on the decree, with interest and costs, except costs of sale, then the master's deed should be destroyed and the quitclaim deed returned and the decree satisfied; Yates to have control of the property and to collect the rents, out of which he

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should pay insurance and taxes, including those delinquent, and the remainder of the rent should be paid to the defendant, and in case of payment in full of the decree and interest by the time specified, said defendant was to return all moneys received from rent to Murray; failure to make these payments and pay the decree was to entitle defendant to the deeds.

The payments of rent were made, but that of the decree was not. Defendant company received its deeds under the agreement and this action is brought by the plaintiff, Murray, to redeem from such deeds and have them declared a mortgage.

Plaintiff states that the sole question in this case is whether the relation of creditor and debtor, after the entering into this agreement, which bears date June 20, 1898, continued to subsist until May 1, 1899. It is urged that if this relation continued, then these deeds in question were simply made and deposited with the clerk, Hillis, as security for its discharge, and were mere mortgages and plaintiff still has the right to redeem, notwithstanding they have been delivered to the defendant company. It must be admitted that the relation of debtor and creditor subsisted between these parties by reason of the decree, and the right to redeem from it, until May 1, 1899; but the deeds, as deeds, until that time had no existence; they were simply held in escrow by clerk Hillis, and their legal effect dates from their delivery by him to the defendant, and it seems clear, as was decided by the district court, that when this took place the relation of debtor and creditor between the parties was ended so far as the sale of these premises constituted a satisfaction of the decree. A fair statement of the real question in the case would be to say that it is whether the agreement, confirmation, and the making of the deeds, constituted an opening of the decree under which the sale was had.

It does not seem to us that it was intended to have any such effect, or that under any established rule, either of law or equity, such effect is a necessary result of the action

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taken by the parties. The indebtedness was merely that on the decree as to which no right of redemption remained, after delivery of the master's deed. The lien of the decree was preserved by Yates' possession, which was to be terminated either by a redemption or by a delivery to defendant under its master's deed. The latter's taking effect was suspended by the agreement under which Mr. Murray gave up his right of appeal in consideration of the extension to him of the privilege of redemption by May 1, 1899; he failed to avail himself of that privilege and the decree, confirmation and deed under it became final. As above suggested we are aware of no rule of law which requires us to decide that a mere agreement to hold in abeyance a decree of foreclosure shall in every case do away with it and reinstate the mortgage. The transaction was not a conveyance of land by Mr. Murray, but a conveyance by the master commissioner. The decree of confirmation and the deed under it were and are amply sufficient to convey the title of the premises to the defendant. The presumption in their favor is not weakened by the fact of this final confirmation being taken by agreement so that from it there was no longer any possibility of an appeal. The taking of the quitclaim deed was, no doubt, intended to strengthen the presumption of a final adjustment under the original decree. It may have been taken merely out of abundant caution and to prevent any gap in the title and to evince more surely the actual understanding of the parties. It has, however, its usual effect to serve rather as an admission of weakness in the master's deed, which it was intended to strengthen.

Notwithstanding this quitclaim deed, however, it seems clear that there was no intention to do away with this decree, that the transaction can not be treated as a conveyance by way of security, and so a mortgage. The actual passage of the title was by the master's deed. This was no device to avoid the effect of our statute giving a mortgagee only a lien. The fact of this quitclaim deed, and the fact of payment of rents to Yates pending the agree-

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ment, are the two things on which plaintiff must rely to support his claim of a doing away with the decree. The payment does not necessarily have such effect any more than does the quitclaim deed. The agreement was only that taxes and insurance be first paid, the remainder to go to the defendant. In case of redemption plaintiff got the benefit, otherwise, defendant. This arrangement simply looked to a satisfaction of the decree, and surely furnishes a weak argument for the claim that the decree was in that way opened up.

We are not prepared to say, as it seems to us an upholding of plaintiff's claim would do, that an extension of time to redeem sets aside a decree and necessitates another foreclosure. It is recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

**CAHILL, SWIFT MANUFACTURING COMPANY V. J. MORRISSEY
PLUMBING COMPANY ET AL.**

FILED JANUARY 8, 1903. No. 12,010.

Commissioner's opinion. Department No. 2.

Account Stated: EVIDENCE: ACCEPTANCE BY DEFENDANT. When suit is brought on an account stated, plaintiff can only recover by showing both the account and an unqualified assent of defendant to its correctness. *Sterling Lumber Co. v. Stinson*, 41 Neb., 368, 59 N. W. Rep., 888, followed.

ERROR from the district court for Douglas county. Tried below before SLABAUGH, J. *Affirmed.*

Crane, Crane & Erwin and *J. J. Boucher*, for plaintiff in error.

Cowin & Abbott, contra.

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stance and request, and to that end filed the following petition (omitting title) :

"Said plaintiff for cause of action against said defendant says that the said defendant is justly indebted to said plaintiff in the sum of \$500 on account of 2,500 bushels of corn, heretofore, to wit on October 15, 1899, furnished to said defendant at his instance and request by plaintiff and said corn was of the reasonable value of said sum of \$500, and no part of the said price has been paid, though the same has often been requested and the same has all been due ever since said October 15, 1899.

"Wherefore, plaintiff asks judgment for said sum of \$500 and interest from October 15, 1899, and costs against said defendant."

To this petition the defendant filed the following answer (omitting title) :

"Comes now the defendant and for answer to the plaintiff's petition denies each and every allegation in plaintiff's petition contained.

"Cross-Petition.

"Comes now the defendant Thomas F. Pence, and for cross-petition against the plaintiff, alleges that this defendant at all times hereinafter mentioned was the owner of the following described real estate, to wit: the northwest quarter of section 8, township 6, range 5, in Gage county, Nebraska, and that plaintiff leased said premises from defendant for one year, extending from March 1, 1899, to March 1, 1900, and occupied said premises during said time, and that a reasonable rental value of said premises so occupied by plaintiff, at the special instance and request of plaintiff, was and is the sum of \$500, and that no part of said rental value has been paid, though the same has often been requested, and that the said sum of \$500 has been due from plaintiff to defendant ever since the 1st day of March, 1899.

"Wherefore, defendant prays judgment against plaintiff for the sum of \$500 and interest from March 1, 1899, together with the costs of suit."

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The plaintiff replied to this answer and cross-petition as follows:

"Comes now the plaintiff and for reply to the answer and cross-petition of the defendant, states:

"1. The plaintiff denies each and every allegation contained in said answer and cross-petition."

The pleadings are thus set out on account of the matters which will be discussed hereafter. Upon these issues a trial was had to a jury, and a verdict was returned in favor of the plaintiff for the sum of \$60. A motion for a new trial was filed and overruled; judgment was entered upon the verdict, and the plaintiff thereupon brought the case to this court by a petition in error. The only conflict in the evidence as shown by the record, was upon two questions, to wit: the value of the corn, and the reasonable rental value of the premises in question. The following facts were fairly established by the testimony: the defendant, Thomas F. Pence, who resides in Illinois, was and is the owner of the premises described in the answer and cross-petition. One Charles Weddington, whose wife was the granddaughter of the said Pence, was indebted to him and others, and was unable to succeed in business and pay his debts in the state of Illinois. Pence being interested in the welfare of Weddington and his wife, sometime in the year 1896 entered into the following agreement with him, as shown by the evidence of the said Pence, which is made a part of the record herein, and which is the only evidence upon the question, to wit:

"The amount owing to me from Mr. Weddington was \$406 at the time the arrangement was made. Mr. Weddington at that time owed J. J. Bryan \$600, S. H. Brown \$235, John Mathers \$190 and there were other small accounts which he was owing. I wanted to help Mr. Weddington, but wanted him to pay the debts he owed me and the others I have named. The arrangements were made at my request in 1896, between him and me, that he should go to Nebraska and farm the land I owned there, the northwest quarter of section 8, township 6, range 5, in

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Gage county, and should pay, first: the debt due me, and then the other debts named, and also pay the taxes on the land. He was to pay these debts about this way: the first year he was to pay me on the amount due me, such a sum as would be a reasonable rent for the land, and as much more as he could, and so on each year until these debts were paid. He has not paid anything on the amount due me or the other parties who I mentioned."

Under this agreement Weddington went into possession of the premises and farmed them during the years 1897, 1898 and 1899. On July 26, of the last year, to wit: 1899, Weddington sold all of his personal property, and the crops growing upon the said land, to the plaintiff, and conveyed the same to him by a bill of sale, which contained the following clause:

"And in part consideration of the above purchase money paid, we do hereby lease the northwest quarter of section 8, in township 6, range 5, east of the 6th P. M., in the county of Gage, Nebraska, unto the said Prokop Janouch for a period of one year, commencing March 1, 1900, and terminating March 1, 1901, except 28 acres of hay land heretofore leased to Albert Beck."

This bill of sale was signed by Charles Weddington and his wife, Clara Weddington, and was duly acknowledged. Plaintiff thereupon put an agent into the house on the premises in question and took possession of the personal property described in the bill of sale, and crops growing upon said land. Weddington immediately left the country, and when Pence ascertained the facts he notified the plaintiff to leave the premises in question. Soon afterwards he commenced an action in the county court of Gage county against Weddington to recover the sum of \$750 for the rent due him for the years 1897, 1898 and 1899. He caused an order of attachment to be issued and levied upon the sixty-four acres of corn situated upon the premises; he obtained judgment against Weddington for the sum of \$600, caused the corn to be sold upon the attachment proceedings, and thereupon the plaintiff brought

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this suit to recover the value of the corn, waiving the tort and suing as upon contract. It further appears from the evidence that during the pendency of the attachment suit Fulton Jack, one of the attorneys for the defendant herein, saw the plaintiff and attempted to effect some sort of a settlement of the matters in controversy. Mr. Jack testifies that he told the plaintiff that he would have to leave the premises, but finally stated to him that he would not compel him to leave until the first of March, 1900, but if he stayed on the premises he would have to pay rent. He further states that thereupon the plaintiff said that he proposed to stay on the premises. It further appeared that plaintiff told him that he did not think he was responsible for the rent, and referred Mr. Jack to his attorney for further discussion of the matter. Plaintiff testified that he never told Mr. Jack that he would pay the rent, and that he has no recollection that Mr. Jack said to him that if he stayed on the place he would have to pay rent. The house on the premises was occupied by the plaintiff's agent, who secured all of the personal property conveyed to the plaintiff except the corn in question herein, until about March 1, 1900. After the foregoing facts were fairly established by the evidence and the testimony closed, the court charged the jury, among other things, as follows:

Instruction No. 4. "If you believe from the evidence that one Weddington leased the farm of the defendant Pence, and agreed to pay a reasonable rent therefor, and further find that said Weddington transferred all of his interest in the lease of said premises, either orally or in writing, from the 1st day of August, 1899, to the 1st day of March, 1900, to the plaintiff, Prokop Janouch, and said Janouch took possession of the same under said agreement, and you are further satisfied from the evidence that neither the said Weddington, nor any other person has paid the defendant Pence, a reasonable rent for the premises for the time the said farm was occupied by the plaintiff Janouch, then the plaintiff would be liable to the defendant Pence, for the reasonable rental value of said premises so occu-

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pied by him for the time he occupied the same under said lease; and the burden of proof as to all these matters is upon the defendant Pence, unless he has established said matters by a fair preponderance of the evidence, he can not recover rent from the plaintiff."

The giving of this instruction was excepted to by the plaintiff, and is alleged as one of the principal grounds of error in his petition.

We think the case will have to be disposed of on this assignment of error, and we therefore decline to consider any of the many others which are alleged in the petition. It is evident that under the terms of the lease, which was a verbal one, Weddington was a tenant at will of the defendant Pence, and that he had no other or further interest in the premises in question. 1 Taylor, Landlord and Tenant [8th ed.], sections 59, 60 and 61. Weddington had no interest in the premises which he could convey to the plaintiff in this case, either by lease or otherwise. It follows that when Janouch took possession of the premises in question by his agent in August, 1899, he did so as a trespasser without the knowledge and consent of the defendant Pence. In order for Pence to recover rent, of the plaintiff, or for the use and occupation of the premises, the relation of landlord and tenant must have existed between them either by express agreement or by implication. That there was no express agreement is beyond all question, and we are satisfied that the facts are not sufficient to establish that relation by implication, or an understanding on the part of the plaintiff to pay rent for the premises to defendant Pence.

"Assumpsit for use and occupation is founded upon a contract creating a tenancy, and will only lie where the relation of landlord and tenant exists." *McNair v. Schwartz*, 16 Ill., 24.

"Although the law will generally imply a contract to pay a compensation for the use and occupation of any premises, yet the possession of a mere trespasser will not sustain this action. It lies indeed only where the con-

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ventional relation of landlord and tenant subsists between the parties founded on an agreement express or implied." 2 Taylor, Landlord and Tenant [8th ed.], section 636; *Skinner v. Skinner*, 38 Neb., 756; *Smith v. Stewart*, 6 Johns. [N. Y.], 46; *Chamberlin v. Donahue*, 44 Vt., 57; *Newby v. Vestal*, 6 Ind., 412; *Cohen v. Kyler*, 27 Mo., 122; *McCloskey v. Miller*, 72 Pa. St., 151; *Ackerman v. Lyman*, 20 Wis., 478; *Atlanta, K. & N. R. Co. v. McHan*, 110 Ga., 543; *Curtis v. Hollenbeck*, 92 Ill. App., 34; *Phœnix Ins. Co. of Hartford v. Hoyt*, *ante*, page 94.

The action for use and occupation is founded upon a contract express or implied, and the relation of landlord and tenant must exist between the parties. In this case Janouch went into possession of the premises under the claim of a lease from Weddington to himself, and not as the tenant of Pence, consequently he was not liable to Pence in an action for use and occupation. *Dudding v. Hill*, 15 Ill., 61.

In *Ackerman v. Lyman*, *supra*, it was held, "That a trespasser can not be converted into a tenant without his consent."

It follows that instruction No. 4 complained of in this assignment, was erroneous, and for the giving thereof the judgment must be reversed and the cause remanded for a new trial. This instruction was erroneous for another reason. It appears from the record that Pence had elected to sue Weddington to recover the identical rent in question in this case, and had obtained a judgment which included the rent of the premises up to the first of March, 1900; had attached the corn on the premises, and had sold it to satisfy his judgment so far as the proceeds thereof would go. It seems to us that he is no longer in a position to maintain an action against the plaintiff to recover rent, or for the use and occupation of the premises in question. If it be contended that Weddington assigned his rights to plaintiff for the balance of the year, ending March 1, 1900, of which fact there is no competent evidence, plaintiff took nothing but the mere right to enter upon the

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premises and remove the crops. This would not create the relation of landlord and tenant. Plaintiff could only be required to account to Weddington for this right, and it appears that he had paid him in full therefor. A careful examination of the record discloses that there was no evidence before the jury which would authorize the giving of this instruction, and it did not conform in its statements to the issues made up by the pleadings. "A misstatement of the issues in an instruction is reversible error." *Galloway v. Hicks*, 26 Neb., 531; *Roberts v. Drchmer*, 41 Neb., 306. The giving of this instruction must have been prejudicial to the plaintiff's interest, because the evidence clearly showed the value of the corn taken upon the attachment, and so converted by defendant to his own use, to be at least \$240. Therefore the jury, in arriving at a verdict, must have allowed the defendant at least \$200 on account of the rent claimed in his answer. We hold, as before stated, that the court erred in giving this instruction. It is unnecessary, therefore, for us to examine and determine any of the other assignments of error contained in the plaintiff's petition.

For the foregoing reasons we recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

POUND and OLDHAM, CC., concur.

REVERSED AND REMANDED.

MARIS PIERCE, TRUSTEE, APPELLEE, v. FRANK D. REED ET AL., APPELLANTS, IMPEADED WITH STEPHEN REED ET AL., APPELLEES.

FILED JANUARY 8, 1903. No. 12,240.

Commissioner's opinion. Department No 1.

1. **Mortgages:** FORECLOSURE: SALE EN MASSE: DISCRETION. A tract of land consisting of two hundred acres lying contiguously in one section, occupied and cultivated as one farm and mortgaged as

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a whole, may, in the discretion of the court or officer, be sold upon foreclosure *en masse*, though portions of the tract are in different quarter sections and are separately assessed for taxation.

2. **Mortgages: FORECLOSURE: APPRAISAL: DEDUCTION OF LIENS: ESTOPPEL TO COMPLAIN.** Provisions regarding the deduction of liens by appraisers of lands about to be sold on execution or foreclosure are for the benefit of the plaintiff, and the defendant cannot complain of their non-observance.
3. **Mortgages: FORECLOSURE: APPRAISAL: QUALIFICATIONS OF APPRAISERS.** The appraisers need not be actually on the land at the time of making the appraisement, nor even in view thereof, provided they are familiar with the premises and acquainted with its value.
4. **Mortgages: FORECLOSURE: APPRAISAL: FRAUD: VALUATION.** The fact that four affidavits are filed asserting the valuation of the premises to be, in the opinion of the affiants, about one-third more than the valuation as found by the three appraisers, is not sufficient to show fraud on the part of the latter.
5. **Mortgages: FORECLOSURE: NOTICE OF SALE: MISTAKE IN DATE.** The fact that a notice of foreclosure sale bears a different date at its first insertion than in the successive issues of the paper containing it, will not vitiate the proceedings if the date of the sale itself and all other essential features of the notice are correctly stated throughout the several publications.
6. **Mortgages: FORECLOSURE: APPRAISAL: DESCRIPTION OF PARTY.** The addition of the phrase "*et al.*" after the names of the defendants whose interest is appraised, there being other defendants in the cause, though none claiming title to the property, will not vitiate the appraisement.

APPEAL from the district court for Dakota county.
Tried below before GRAVES, J. *Affirmed.*

R. E. Evans, for appellants.

John T. Spencer, for appellee Hollman.

Wm. P. Warner, for appellee Pierce.

F. M. Northrop, for People's Savings Bank.

LOBINGIER, C.

This is an appeal from an order confirming a foreclosure sale. In a motion to set aside the sale and objec-

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tions to its confirmation numerous questions are raised, most of which have already been determined by this court adversely to the contention of appellants. It is argued that the decree should be reversed because the premises were not sold in parcels, and *Runge v. Brown*, 29 Neb., at page 120, is relied upon. The court there stated the well settled rule "that separate tracts or parcels of land must be appraised separately." But a glance at the statement of facts discloses what was meant by the phrase "separate tracts or parcels." The property levied on consisted of a town lot and a tract of land containing two hundred and forty acres, and the court merely declares that the lot should have been appraised separately from the land. In this case the mortgaged property consists of a farm of two hundred acres all in the same section, mortgaged as one tract and occupied and farmed as a whole by the mortgagor. The mere fact that portions of the land lay in different quarters of the section did not make them "separate tracts or parcels" within the rule above stated. Indeed, it is well settled that even separate city lots, when subject to a single mortgage, may be ordered sold *en masse*, and that in the absence of express directions it is discretionary with the officer to sell in that manner provided there is no showing of prejudice. *Kane v. Jonasen*, 55 Neb., 757. As to the objection that since the land was taxed in forty-acre tracts the liens therein should have been certified to separately, it is sufficient to say that it is now well settled that provisions for the deductions of liens are for the benefit of the plaintiff and that defendant can not complain of their non-observance. *American Investment Co. v. McGregor*, 48 Neb., 779.

It is urged that the appraisement was not made on actual view. The appraisal itself recites that it was so made, but one of the appraisers afterwards makes affidavit that it was made at his home. It, however, appears from the affidavit of the sheriff that this home was "within sight" of the mortgaged premises and that both appraisers had resided within a mile and a half thereof for more than

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ten years and were well acquainted with the premises. Under these circumstances it was not necessary that the appraisement should have been made on the land itself. *Bostwick v. Keller*, 62 Neb., 815. The case last cited also answers the objection (which seems to contradict the record) that no copy of the appraisal was filed, and there is nothing in *American Investment Co. v. McGregor*, 48 Neb., 779, cited by appellants which is inconsistent with its doctrine.

The value of the premises as found by the appraisers was \$3,200, and it is complained that it was too low. One affidavit filed in behalf of the appellants fixes the value at \$4,600, and three others place it at \$4,800. But neither in these affidavits nor in the motion to set aside the sale, nor in the objections to confirmation, is it alleged or claimed that the valuation was fraudulent. It is now the established rule in this state that "to use the low valuation as a successful basis for attacking the appraisement, it must be alleged and proved that it was fraudulent." *Brown v. Fitzpatrick*, 56 Neb., 61. It is true that appellants filed what was termed an "objection to appraisal and motion to set appraisal aside" in which they alleged *inter alia* that "said appraisal is void because the value thereof is grossly inadequate, and so inadequate as to be a fraud on the rights of these defendants." But no further indication of fraudulent intent is alleged and we have simply the opinions of these four affiants as to value against the official finding of the three appraisers. We can not infer fraud from such a showing.

The objection which appears to be chiefly relied upon concerns the notice of sale. This was published in five successive issues of the paper, commencing January 26, the sale being held February 26, following. This was a publication for thirty days within the requirements of the statute. *Von Dorn v. Mengedoh*t, 41 Neb., at page 538; *Carlow v. Aultman & Co.*, 28 Neb., 672. But upon its first insertion the notice was dated January 18, while in the succeeding issues of the paper it bore date January

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24, which is shown by the sheriff's affidavit to have been the date of depositing the copy of the appraisement and also the true date of the notice. It is claimed that because the notice was not dated the same in all the issues of the paper there was not a publication of the same notice for thirty days. But we do not think that this date was any part of the notice itself. The function of the notice is to give information concerning the sale, its date, subject-matter, terms, etc. Had any of these been wrongly stated there would have been room for the contention that prospective bidders might have been misled and competition at the sale prevented. But the error complained of related to none of these features and could not have misled anyone as to the sale itself. Moreover, it has been the uniform holding of this and other courts that mere clerical errors of this sort would not vitiate the sale. In *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb., at page 286, judgments were described in the notice as being against parties who have been dismissed from the action. But this court considered the objection insufficient even when taken with many others and said, "the notice certainly was inaccurate in this respect, but we can not see how the investment company (defendant) could possibly have been prejudiced thereby." In *Field v. Brokaw*, 59 Ill. App., 442, the defendant's first name was given as "Cornelia" when it should have been "Cornelius," and in *Horton v. Bassett*, 16 R. I., 419, the plaintiff was designated as "Bartlett" instead of "Bassett," yet in neither of these cases was the notice held to be defective, and the inaccuracies, though certainly as great as here, were disregarded. It seems to us that the mistake in dating this notice at its first insertion as January 18, is like those above noticed, an immaterial and non-prejudicial error, and that for all essential purposes the notice was the same throughout the publication. We think the same may be said of the objection to the appraisal because it adds the phrase "et al." after the names of the appellants in appraising their interest. None others claimed title to the

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land and no one could have been misled by the mistake. Finding no reversible error in the proceedings we recommend that the decree be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

HATTIE L. BRAND, APPELLEE, v. JOSEPH GARNEAU, JR., ET AL., IMPLEADED WITH BURNEY J. KENDALL, APPELLANT, ET AL.

FILED JANUARY 8, 1903. No. 12,382.

Commissioner's opinion. Department No. 2.

1. **Mortgages: FORECLOSURE: DEFICIENCY: DEFENSES CANNOT ANTE-DATE DECREE.** Where, in an action to foreclose a mortgage, the facts showing defendants' liability for a deficiency are set out in the petition, and a judgment against those personally liable for the debt is prayed for, and the court finds that the defendants are personally liable for the payment of any deficiency that may exist after the sale of the mortgaged premises, while such decree remains in force and unmodified, they cannot be permitted, when a judgment for a deficiency is sought, to set up the facts which existed when the original decree was obtained, to show that they are not liable.
2. **Mortgages: FORECLOSURE: APPEAL AND ERROR: DEFICIENCY: LIMITATION OF ACTIONS.** An appeal from a decree or order confirming a sale of real estate, in a foreclosure suit, suspends the running of the statute of limitations against an application for a deficiency judgment, and when a motion therefor is made immediately after the decree is affirmed in the appellate court, it will be held to have been made in time.
3. **Mortgages: FORECLOSURE: DEFICIENCY: JURISDICTION: STATUTES.** The jurisdiction of the district court to render a deficiency judgment under the provisions of section 847 of the Code of Civil Procedure, as it stood before its repeal, did not depend upon the service of any notice other than the original summons. *Graves v. Macfarland*, 58 Neb., 802, approved and followed.
4. **Mortgages: FORECLOSURE: DEFICIENCY: NOTICE TO CO-DEFENDANT.** One against whom a deficiency judgment has been rendered cannot complain because a co-defendant was not served with notice.

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APPEAL from the district court for Douglas county.
Tried below before ESTELLE, J. *Affirmed.*

Albert Swartzlander, for appellant Kendall.

J. O. Detweiler, contra.

BARNES, C.

On the 11th day of December, 1890, one Charles F. Mullin executed and delivered his certain promissory note for \$600 due December 11, 1893, negotiable in form and bearing interest at ten per cent. per annum, payable annually, to The Patrick Land Company of Omaha, Nebraska. Said note had attached thereto six interest coupon notes, bearing the same date, and payable at different times, the last one being payable when the principal note became due. These notes were also negotiable in form. To secure the payment thereof the said Mullin at the same time executed and delivered to The Patrick Land Company his mortgage deed, by which he sold, transferred and conveyed unto said company, lot eight in block 103, Dundee Place, an addition to the city of Omaha. The mortgage was duly recorded in the office of register of deeds of Douglas county, and on or about February 3, 1891, Mullin sold and conveyed the premises above described, by warranty deed, subject to the said mortgage, to Joseph Garneau, Jr., who assumed and agreed to pay the mortgage debt. On or about the 24th day of June, 1891, The Patrick Land Company sold and delivered the notes and the mortgage above described, to one Burney J. Kendall; and on or about June 30, 1891, Kendall sold, transferred, indorsed and delivered the said notes and mortgage to one J. M. Woods, who afterwards sold and delivered them to the appellee, Hattie L. Brand. When the principal note became due all of the interest coupon notes had been paid except the one which was due at the time. Default in the payment having been made an action was commenced in the district court for Douglas county by the

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appellee against Joseph Garneau, Jr., The Patrick Land Company, Burney J. Kendall, J. M. Woods and Lizzie Garneau, to foreclose the said mortgage. Defendant, James M. Woods, was not found or served with a summons, and the action was dismissed as to him without prejudice. All of the other defendants were duly served with summons. The Patrick Land Company defaulted, but Joseph Garneau, Jr., Lizzie Garneau and Burney J. Kendall, each entered an appearance and answered. The petition set forth facts making Joseph Garneau, Jr., personally liable for the mortgage debt, both principal and interest. It also contained sufficient allegations to charge the defendant, Burney J. Kendall, with the payment of the debt, as an indorser of the notes in suit. The petition also contained a prayer for a personal judgment against defendants Garneau, Kendall, and The Patrick Land Company, for the deficiency, if any, after the sale of the mortgaged premises. Upon the trial in the district court, among other things, the court found as follows:

"That no proceeding at law has been had for the recovery of the debt, and that upon a sale of the mortgaged premises and a failure of the proceeds arising therefrom to pay said note, said Joseph Garneau, Jr., The Patrick Land Company and Burney J. Kendall are personally liable for any deficiency that may remain unpaid."

Upon these findings the court entered a decree of foreclosure which was never appealed from by any of the defendants, and remains in full force and effect, unreversed and unmodified. An order of sale was issued directed to the master commissioner appointed by the court to execute the decree; the mortgaged premises were sold, and the return to said order of sale showed a deficiency of \$800.04. Afterwards, at the September term of said court an order was entered confirming the sale and directing the master commissioner to execute the deed for the premises to the purchaser at the sale. An appeal was taken from the order of confirmation to this court, and at the January term, 1901, the judgment of the lower

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court was affirmed. On the 2d day of April following, a mandate was issued commanding the district court, without delay, to award execution to carry into effect its judgment in the manner provided by law. On the 10th day of April following, plaintiff filed her motion in the said court for a deficiency judgment against the defendants, Joseph Garneau, Jr., The Patrick Land Company and Burney J. Kendall. Notice of the hearing of the motion was served upon Albert Swartzlander, the attorney of record in that case for Burney J. Kendall, who appeared and filed his objections, which were overruled and a deficiency judgment was rendered against all of the defendants named in the motion. Thereupon, Burney J. Kendall appealed to this court, and now contends that the court erred in overruling his objections and rendering a deficiency judgment against him.

1. It is urged by the appellant that the contract sued upon is not a negotiable instrument as defined by the law merchant, and therefore he was not liable thereon as an indorser, notwithstanding his indorsement was in the regular form, to wit, "Pay to the order of J. M. Woods," because the note; in addition to the promise to pay money, contains stipulations to do other things, to wit: It was provided therein that if any interest coupon was not paid when due, the whole of the note should immediately become due and collectible by suit, at any time; that if the note was not paid when due, either by maturity or by reason of failure to comply with the terms of the mortgage given to secure the same, which was made a part thereof, or by default in the payment of any interest coupon, then the same should bear interest at the rate of ten per cent. per annum, principal and interest payable at the office of The Patrick Land Company of Omaha. It is also stated that the mortgage contains a stipulation to pay taxes and assessments, and that in default thereof the holder of the mortgage might pay the same and recover the amount with ten per cent. interest; that if Mullin should fail to pay interest when due then the whole

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sum of money should at once become due and payable at the option of The Patrick Land Company, without further notice, and other provisions usually contained in a real estate mortgage securing the payment of a promissory note.

Some of the authorities cited by appellant, from other states, would seem to be in point, and support his contention if the question were now open for our consideration but it is sufficient to say that it has been settled by quite a number of decisions of this court.

In the case of *Garnett v. Myers*, 65 Neb., 280, 91 N. W. Rep., 400, we held that: "The agreement, in a mortgage, to pay 'all the taxes and assessments levied upon said premises, and all taxes and assessments levied upon the holder of the mortgage for and on account of the same,' will not render the note which it is given to secure non-negotiable."

In *Consterdine v. Moore*, 65 Neb., 291, 91 N. W. Rep., 399, we held as follows: "The agreement, in a mortgage, to pay insurance premiums and taxes on the property mortgaged, will not render the note which it is given to secure non-negotiable, nor will the agreement that, if the mortgagor fails to pay such insurance and taxes, the mortgagee may declare the whole debt due and payable at once, or may elect to pay the same and declare the whole debt due" have that effect.

In *Northern Counties Investment Trust v. Edgar*, 65 Neb., 301, 91 N. W. Rep., 402, *Garnett v. Myers*, *supra*, was approved and followed. The same point was decided in the same way by this court in *Kendall v. Selby*, 66 Neb., 60. These decisions of themselves would defeat the appellant's contention, but he can not now litigate this question. Upon the trial in the foreclosure suit where this question was directly in issue, the court found that he was personally liable as indorser upon the notes in question, and that he was liable for the deficiency upon the coming in of the report of the sale of the mortgaged premises. He never appealed from that finding and judg-

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ment, and the same can not now be reviewed. *Devries v. Squire*, 55 Neb., 438; *Stover v. Tompkins*, 34 Neb., 465; *Kloke v. Gardels*, 52 Neb., 117; *Patrick v. National Bank of Commerce*, 63 Neb., 200, 88 N. W. Rep., 183.

In the case last above cited, it was held that where facts showing defendant's liability for a deficiency are set out in the petition to foreclose, and a judgment against those personally liable for the debt is prayed, the court has jurisdiction after a sale of the mortgaged premises to enter a deficiency judgment against the defendants, so found liable, on a motion therefor by the plaintiff. It was further held that in such a case where the court in its decree finds that the defendants are personally liable for the payment of any deficiency that may exist after a sale of the mortgaged premises, they can not, while such decree remains in force and unmodified, be permitted, when judgment for deficiency is sought, to set up facts which existed when the original decree was obtained to show that they are not liable. This completely disposes of the appellant's first ground of objection.

2. Appellant further claims that the court should not have entertained a motion for a deficiency judgment, filed more than four years after the district court confirmed the sale. It appears from the record that an appeal was taken from the order confirming the sale, and that said appeal was pending and undetermined in this court until the January term, 1901; that the mandate commanding the lower court to award execution to carry into effect its said judgment, was issued on the 2d day of April, 1891. The motion for a deficiency judgment against the appellant and others, was filed on the 10th day of the same month, which was immediately after the determination of the appeal. Appellant's contention on this point is not good, because it was held in *Patrick v. National Bank of Commerce*, *supra*, that an appeal from a decree of foreclosure, or a confirmation of sale where a deficiency judgment was asked, tolled the running of the statute of limitations during the pendency of the appeal.

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3. Appellant contends that the court was without jurisdiction to render a deficiency judgment, upon the motion, against him because he was not personally served with the notice of the pendency thereof; that service upon his attorney was not sufficient to give the court jurisdiction to render the deficiency judgment against him. This objection was properly overruled. This question was before the court in *Graves v. Macfarland*, 58 Neb., 802, and it was held that the jurisdiction of the district court to render a deficiency judgment under the provisions of section 847 of the Code of Civil Procedure, did not depend upon the service of any notice other than the original summons.

4. Appellant's last contention is, that the deficiency judgment was also entered against Garneau and The Patrick Land Company, together with himself jointly, and The Patrick Land Company was not notified in any way of the application therefor. Our ruling upon the preceding objection settles this question, and in any event the appellant could not object to the judgment because some other person was not served with notice.

It thus appears that every question raised by the appellant in this case has been repeatedly determined against him by this court. We therefore recommend that the judgment of the district court be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

NOTE.—The judgments in the three cases cited in the above opinion in support of the contention that the contract sued upon was negotiable, were reversed upon rehearings in each case and the opposite view held in each opinion on rehearing. See *Garnett v. Myers*, 65 Neb., 287; *Consterdine v. Moore*, 65 Neb., 296; *Northern Securities Investment Trust v. Edgar*, 65 Neb., 303.—REPORTER.

Ogden v. State.

CHARLES OGDEN, IN THE MATTER OF CONTEMPT PROCEEDINGS, v. THE STATE OF NEBRASKA.

FILED JANUARY 8, 1903. No. 12,384.

Commissioner's opinion. Department No. 3.

1. **Contempt. FORMAL ACCUSATION: NECESSITY FOR.** While a formal accusation is not necessary to a prosecution for contempt committed in the presence of the court, the record must show that such an offense has been committed in order to sustain a conviction.
2. **Contempt: PLEADING CONCLUSIONS: LANGUAGE SET OUT.** A recital that the accused addressed insulting and menacing language to the court is a mere conclusion; the language itself should be set out to enable the reviewing court to determine whether it was actually contemptuous.
3. **Contempt: COMMISSION IN PRESENCE OF COURT: RECORD.** Where the prosecution for contempt proceeds on the theory that such contempt was committed in the presence of the court, the record is 'insufficient unless it shows that the offense was thus committed.

ERROR from the district court for Douglas county. Tried below before KEYSOR, J. *Reversed.*

J. W. West and Charles Ogden, for plaintiff in error.

F. N. Prout, Attorney General, and Norris Brown, Deputy, contra.

ALBERT, C.

This proceeding was brought by Charles Ogden, Esq., to reverse a judgment of the district court, whereby a fine was imposed on him for contempt of court. The record of the district court, omitting the formal parts, is as follows:

"On this day again come the parties hereto attended by their counsel; also come the jury heretofore duly impaneled and sworn and this cause proceeds. Whereupon the court finds that Charles Ogden, Esq., counsel for the said defendant, did on this day address to the court on

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the trial of this case insulting and menacing language; that he has threatened opposing counsel with an assault, and did willfully refuse to obey the order of the court to take his place at the counsel table and be seated.

"It is therefore adjudged by the court that the said Charles Ogden, Esq., is guilty of the offense of contempt, and it is the judgment of the court that the said Charles Ogden, Esq., pay a fine in the sum of twenty-five dollars (\$25) and the costs of said contempt proceedings, taxed at \$——. And it is further ordered by the court that the said Charles Ogden, Esq., be committed to the jail of this said county of Douglas, state of Nebraska, until said fine and costs are fully paid. To which finding and judgment of the court said Charles Ogden duly excepts."

In our opinion, the judgment can not stand. The record shows three specifications against the accused: (1.) That he addressed insulting and menacing language to the court during the trial of a case. (2.) That he threatened opposing counsel with an assault. (3.) That he willfully refused to obey the order of the court to take his place at the counsel table and be seated. It will be observed that the proceedings were conducted on the theory that the contempt was committed in the presence of the court. While it has been held that a formal accusation is not necessary under such circumstances, it is undoubtedly essential that it should affirmatively appear on the face of the record with all the certainty of an indictment or information, that an offense had been committed. In our judgment, such fact does not thus appear in this case. The language, which the trial court held to be insulting and menacing, is not set out. It will not be claimed that an indictment or information, thus charging an analogous offense, would be good. Hence, the record, in that behalf, is insufficient to sustain a judgment of conviction.

As to the third specification, a court does not stand *in loco parentis* to the attorneys practicing before it. Ordinarily they are not subject to its orders as to when they

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shall sit nor where they shall sit. No doubt, circumstances may arise which would justify such orders, and which would render disobedience of them contempt of court. But in order to sustain a conviction for contempt for a disobedience thereof, it must not only appear that the court made the order and the accused violated it, but that the circumstances justified the court in making it. The circumstances, under which the order was made in this case, do not appear. It follows that the judgment of the district court can not be sustained and we recommend that it be reversed.

AMES and DUFFIE, CC., concur.

REVERSED AND REMANDED.

NEBRASKA SHIRT COMPANY V. RICHARD S. HORTON, TRUSTEE OF THE GREATER AMERICAN EXPOSITION.

FILED JANUARY 8, 1903. No. 12,406.

93 NW 225
Commissioner's opinion. Department No. 2.

1. Corporations: SUBSCRIPTIONS TO STOCK OF ANOTHER CORPORATION.
Unless authorized by statute, a corporation has no power to subscribe to the capital stock of another corporation, and such a subscription is not binding.
2. Corporations: SUBSCRIPTIONS TO STOCK OF ANOTHER CORPORATION:
REPUDIATION: ESTOPPEL. Where no money or property of any kind has been acquired or held by virtue of the transaction, mere inaction and neglect to repudiate it will not estop the subscribing corporation when sued upon such a subscription.

ERROR from the district court for Douglas county.
Tried below before SLABAUGH, J. *Reversed and dismissed.*

Silas Cobb, for plaintiff in error.

T. W. Blackburn and Richard S. Horton, contra.

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POUND, C.

The plaintiff below, as trustee in bankruptcy of the Greater American Exposition, a corporation, sued the defendant, a manufacturing corporation, upon a stock subscription. The petition alleges that the defendant corporation signed, executed and delivered to the promoters of the exposition company an agreement to take and pay for ten shares of stock of the latter company; that by such agreement it intended to become a stockholder therein; that four different calls were duly made, each for twenty-five per cent. of the subscriptions, and that none of said calls were paid. The defendant pleaded that it was a manufacturing corporation, organized solely for the manufacture of shirts, and claimed that the subscription was made by its manager without authority from the directors or stockholders.

We are at a loss to see how this action can be maintained on the face of the pleadings. Corporations have quite enough power without allowing them to incorporate themselves in new companies. Unless authorized by statute, a corporation has no power to subscribe to the capital stock of another corporation, and such a subscription is not binding. *Valley R. Co. v. Lake Erie Iron Co.*, 46 Ohio St., 44, 18 N. E. Rep., 486; *The Denny Hotel Co. v. Schram*, 6 Wash., 134, 32 Pac. Rep., 1002; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq., 475; *Franklin Co. v. Lewiston Institution for Savings*, 68 Me., 43; *The Mechanics and Working Men's Mutual Savings Bank v. The Meriden Agency Co.*, 24 Conn., 159; *Knowles v. Sandercock*, 107 Cal., 629, 40 Pac. Rep., 1047; *The Peshigo Co. v. Great Western Telegraph Co.*, 50 Ill. App., 624; *Milbank v. The New York L. E. & W. R. Co.*, 64 How. Pr. [N. Y.], 20. It is said that the new corporation was organized, and held the exposition, without any objection or repudiation of the subscription on the part of defendant or its officers. But it does not appear that the defendant or any of its officers made any claims or asserted any

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rights as stockholders. They did not acquire nor do they hold any money or property by virtue of the unauthorized transaction. On the contrary it is alleged that they refused to pay the several calls as they were made. We see nothing in the mere inaction and neglect to formally repudiate the transaction which should estop the subscribing corporation when sued on such a subscription.

We recommend that the judgment be reversed and the action dismissed.

BARNES and OLDHAM, CC., concur.

REVERSED AND DISMISSED.

JOHN J. TRACY ET AL. APPELLEES, V. LEON GREZAUD ET AL.
APPELLANTS.

FILED JANUARY 8, 1903. No. 12,418.

Commissioner's opinion. Department No. 1.

1. **Municipal Corporations: TOWN SITE: PATENT: VACATION: PLEADING.** A petition merely alleging a patent to a city council under "the town-site act" of congress, that two individuals have always constituted that council, a conveyance by one of them jointly with a third party of the land, subsequent *mesne* conveyances by which this title came to plaintiffs, a platting of the land, occupation of it by numerous persons as a town site for about six years and then the vacation of the plat by the county commissioners, does not disclose a legal or an equitable estate in two plaintiffs suing jointly to quiet title, although one of them is one of the persons alleged to constitute the council.
2. **Pleading: OBJECTION OF NO CAUSE OF ACTION: AVAILABLE WHEN.** Where no cause of action appears in the petition, the objection on that ground is good at any stage of the action.

APPEAL from the district court for Dakota county.
Tried below before GRAVES, J. *Reversed with directions.*

Lohr, Gardner & Lohr and R. E. Evans, for appellants.

Quick & Carter and H. E. Siman, contra.

HASTINGS, C.

This is an appeal in equity from the district court for Dakota county. Plaintiffs allege that they are the owners of 440 acres of land in that county and that their title was derived from a patent dated July 2, 1860, to the city council of the city of St. Johns; that the said city council at that time and ever since was one J. F. Tracy and John J. Tracy and no other persons; that the land was entered under the "town site act" and was platted as the city of St. Johns, and the plat recorded; that it was occupied as a town site and many settlers and lot owners resided there until December 3, 1866, when the plat was vacated by the county commissioners of Dakota county and the land reverted to, and became the property of, the said J. F. Tracy and John J. Tracy by reason of the vacation; that June 25, 1859, this land was conveyed by warranty deed by M. M. and John J. Tracy to I. G. Lash; that the latter conveyed the lands, by warranty deed, April 30, 1867, to James A. Tracy; that James A. Tracy and wife conveyed the said lands by warranty deed to M. M. Tracy, March 22, 1875. All of these conveyances are alleged to have been recorded. It is alleged that since the last named date M. M. Tracy conveyed a one-half interest in said lands to John J. Tracy, his co-plaintiff. It is alleged that the vacation of the plat by the county commissioners is too informal to constitute evidence of legal title and plaintiffs are therefore compelled to bring the action in equity.

It is alleged that defendants' interest is derived solely through a tax deed by the county treasurer of Dakota county, dated February 5, 1876, and recorded nine days later, pretending to convey to one John B. Arteaux the said lands; that no seal was ever attached to said tax deed; that it shows on its face that the lands were sold in gross and for a gross sum and not in the manner provided, and for these reasons and many others the deed is void upon its face. That all of the defendants except Severson, Olhman and Kellner claim as heirs at law of

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J. B. Arteaux; that the other named defendants claim by a conveyance from Arteaux; that no one is in actual possession of the lands; that plaintiffs are entitled to the possession and have constructive possession by reason of their title as set forth. The relief asked is to be allowed to redeem from the taxes represented by the Arteaux deed, and from any subsequent taxes paid by him or his successors and interest and that on such payment title be quieted in plaintiffs.

The defendants Severson, Olhman and Kellner were never served with summons and were dismissed out of the action. The other defendants answered, admitting the tax deed and its recording; alleging that they are the sole heirs at law of John B. Arteaux, and that they claim the lands under the tax deed; allege that the action of plaintiffs is barred by reason of laches as shown by the petition; say that the allegations of the petition do not show title in the plaintiffs nor any right to recover the premises; allege that they and their ancestor are and have been for more than ten years, preceding the beginning of this action, in open, exclusive, notorious and adverse possession of the lands; they allege a recovery on June 3, 1873, by Arteaux of a judgment in the district court of Dakota county, against James A. Tracy, through whom plaintiffs claim, for \$535 and \$9.28 costs, and that the judgment bore interest at 12 per cent. per annum; that James A. Tracy, shortly after the judgment was rendered, absconded from Dakota county and the state of Nebraska and has been absent therefrom ever since and his whereabouts unknown; that at the time of the conveyance by J. A. Tracy and wife to M. M. Tracy, March 22, 1875, of these lands, the judgment was alive and in full force and effect and a lien upon the real estate, and was so when Arteaux received his tax deed; that said judgment has since become dormant and these defendants as heirs at law of John B. Arteaux own it, and if plaintiffs are permitted to redeem from said tax sale and recover said lands, defendants are equitably entitled to have the judgment re-

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vived and declared a lien in full force and effect upon the lands in question. Defendants say that they are the owners of the lands, and the conveyances mentioned in plaintiffs' petition are a cloud upon their title, which they ask to have quieted as against said plaintiffs. They deny the plaintiffs' remaining allegations and pray that the plaintiffs' petition be dismissed and their title quieted, or if that can not be done, that before plaintiffs are allowed to redeem they be required to pay the full amount of the judgment, interest, and costs as well as the taxes and interest paid by Arteaux and his successors upon these lands.

The district court found that plaintiffs were the owners of the lands and entitled to possession upon redemption from the tax sale. It found taxes, with interest and attorney's fee, to the amount of \$2,307.50, and canceled the defendants' title of record upon payment, within twenty days, of said sum and costs. It found that the judgment set up by the defendants was no lien. From this decree the defendants appeal.

From the foregoing statement of the pleadings it will be seen that the essential questions in this case are three: 1st. Have plaintiffs a title to these premises from the United States government through the patent to the city council of St. Johns? 2d. Have the defendants been in open, exclusive, notorious and adverse possession under the tax deed to Arteaux for ten years or more preceding the commencement of this action? 3d. If both of the former questions are resolved against the defendants, are they entitled to a lien by virtue of the judgment set forth in their answer? There is no complaint as to the amount declared of defendants' tax lien in the decree, if the plaintiffs are allowed to redeem from it.

It is extensively argued in the briefs of counsel that under the evidence in this case plaintiffs had no right to resort to equity because defendants were in possession and claiming a legal title in the lands. As to this it is sufficient to say that, granting that plaintiffs have title,

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all, they must recover either in their own right, or as beneficiaries of the trust expressed in the patent, or else as trustees entitled to possession. The act under which these lands were obtained, provides that if the city is incorporated, its mayor, and if unincorporated, the county judge of the county in which it is situated, shall be the proper officer to execute deeds. *Burbank v. Ellis*, 7 Neb., 156. There is nothing in this petition from which it could be inferred that any conveyance in accordance with this provision has ever been made, or anything which would operate to transfer the legal title from the city council of the city of St. Johns.

There is an allegation in the petition that the city council at the time of the issuance of this patent and ever since consisted of the plaintiff, John J. Tracy and one J. F. Tracy, but that either of them had any authority to make any conveyance or that either of them had any beneficial interest in this trust, which they are alleged to have held, does not appear. This action is not brought by them to recover as trustees; it is brought by one of them in his private capacity and alleging a general ownership in himself with the other plaintiff.

There is no possibility, in this action, to sustain the decree in favor of the plaintiffs on the ground that they are, or are alleged to be, the trustees named in the patent. There could be no recovery on that ground.

Under the allegations of legal title in their own right, it is plain that there could be no recovery by the plaintiffs as beneficiaries of the trust. If they are to recover on any such ground, it will have to be under allegations disclosing their rights and competent proof sustaining them. It is true that there was some evidence introduced, over defendants' objection, to show that at the time of the execution of the deed by the plaintiffs to Israel G. Lash, which is set forth in the petition, John J. Tracy was mayor of the city of St. Johns. The evidence was objected to and there seems no doubt that the objection was well taken and that the evidence should not have been considered by

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the trial court. As there is neither allegation nor proof of any incorporation of the city, the evidence, if admissible, would hardly be of any avail.

It is earnestly contended by the plaintiffs that no objection of authority on the part of any person to convey away the city's title to these lands can be raised except by the city itself. It is true, as was held in *Tierney v. Cornell*, 3 Neb., 267 (Tecumseh Town Site Case), that the trustee in making a deed, under the act of congress, acts judicially, and his determination as to who is entitled to the deed can not be impeached collaterally, but before any such weight can be given to a deed, it must appear to have been issued by the duly qualified trustee acting in pursuance of his authority. As long as no such authority is either alleged or admitted on the part of the makers of any deed embraced in this record, it would seem unnecessary to discuss the claim for immunity from collateral attack. On the part of the defendants, it is claimed that the evidence of their ten years' possession before the commencement of this action is conclusive, but they seem to admit that there is proof tending to show that about 1890 their possession was not exclusive and that the tenant then farming a portion of these lands was paying rent to one of the plaintiffs. It would seem that the determination as to the question of adverse possession was made by the trial court upon conflicting evidence, and in case of a retrial should be again submitted.

It seems probable, under the evidence and circumstances of this case, that the plaintiff, John J. Tracy, at least, has some equitable rights as a beneficiary in the trust mentioned in this patent. If so, he is entitled to vindicate them, unless precluded by his laches. The peculiar circumstances involved, the death of one brother, the disappearance of another, should probably excuse any such apparent laches, especially as against a title which, if it becomes a title at all, can only do so by virtue of the statute of limitations. The liberal use of the right of amend-

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ment should be allowed, in a case of this kind, to prevent the running of the statute of limitations.

The third question, as to the right of the defendants to a lien, it hardly seems worth while to discuss under the present situation of the record. The judgment was against James A. Tracy; 160 acres of the land was deeded to Lash by James A. Tracy in 1867, and in 1875 James A. Tracy conveyed, by warranty deed, to M. M. Tracy; subsequent to this transaction, and without any levy having been made, the judgment, which was rendered in 1873, became dormant. As we have held that there was nothing before the district court to show that any title has passed out of the city council of St. Johns to any of these Tracys, it would seem wholly superfluous at the present time to discuss whether or not this is one of the cases in which one who seeks equity will be compelled to do it notwithstanding a statute of limitations. It would seem that no such doctrine could arise except as against a party originally obligated to pay the judgment.

It is recommended that the decree of the district court be reversed and the cause remanded with instructions to the district court to permit such amendment of the plaintiffs' pleading, if desired, as shall show either a legal estate because of a conveyance in execution of the trust in the patent, or an equitable estate because of a beneficiary interest in that trust on the part of the plaintiffs, or else a legal right as trustees, and in default of such amendment that the action be dismissed.

KIRKPATRICK and LOBINGIER, CC., concur.

The decree of the district court is reversed and the cause remanded with instructions to the district court to permit such amendment of plaintiffs' pleading, if desired, as shall show either a legal estate because of a conveyance in execution of the trust in the patent, or an equitable estate because of a beneficiary interest in that trust on the part of the plaintiffs, or else

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a legal right as trustees, and in default of such amendment that the action be dismissed.

REVERSED WITH DIRECTIONS.

C. O. RYDSON V. NELS LARSON.

FILED JANUARY 8, 1903. No. 12,425.

Commissioner's opinion. Department No. 3.

Vendor and Vendee: CONTRACTS: SALES: PLEADING: TITLE. On the sale of a threshing machine it was agreed between the vendor (plaintiff in error) and vendee, that the vendor should collect all accounts due the vendee arising from the use of the machine, applying one-half of said collections to the amount due him on the sale of the machine, paying the other half to the vendee. From the statements of the petition it appears that the machine became the property of a third party who did threshing for the defendant in error, the bill for which he refused to pay to the plaintiff who brought suit therefor, his petition alleging the facts above set forth. *Held*, That a demurrer to the petition was properly sustained.

ERROR from the district court for Polk county. Tried below before SORNERBERGER, J. *Affirmed*.

John Tongue, for plaintiff in error.

Mills & Mills and E. E. Stanton, contra.

DUFFIE, C.

On the 29th day of June, 1898, the plaintiff in error sold to John Baldwin and Fred Volroth a threshing machine outfit and the parties entered into the following contract relating to said sale:

"This agreement made this 29th day of June, 1898, by and between John Baldwin and Fred Volroth both of Merrick county, Nebraska, parties of the first part, and C. O. Rydson of Hamilton county, Nebraska, party of the second part witnesseth: that the parties of the first part in

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consideration of the sale to them by the party of the second part, of a J. I. Case steam threshing machine outfit complete, and giving them until January 1, 1900, in which to make complete payment of the same, hereby agree that party of the second part may, and is to collect all accounts due said parties of the first part arising from their use of said threshing machine, and after applying one-half of said collections on the amount due said second party from said first parties on the sale of said machine, then said second party is to pay the other one-half of said collections to said first parties. And for and in consideration of above mentioned, the said second party agrees to collect all of the accounts above mentioned, which are collectible and apply same as above specified, to wit: one-half to be applied on the amount due him on said machine, and one-half to be given by him to said first parties."

In August, 1899, the machine was used to thresh the grain of the defendant in error, the bill therefor amounting, at the usual rates, to \$31.40. Sometime afterward Rydson called upon the defendant in error to collect this bill, informing him of his contract relating to the collection of bills earned by the machine. Larson agreed to pay the bill but wanted time in which to market his grain. Afterward he refused payment and this action was instituted to recover the amount.

A demurrer to the petition was sustained by the district court upon the theory, as we understand from the briefs filed, that the contract under which the plaintiff claimed the right to recover was in effect a mortgage or assignment of the future earnings of Baldwin and Volroth previous to any employment or contract of employment. The rule is well settled that an assignment of moneys not yet earned but expected to be earned in the future under an existing contract, is valid and enforceable. *Perkins v. Butler County*, 44 Neb., 110, and authorities cited. And it is equally well settled that there can be no valid assignment of future wages where they constitute a mere posi-

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bility coupled with no interest; that a person under no subsisting engagement or contract for employment, cannot make a valid assignment of wages to be earned under a possible future engagement. *Twiss v. Cheever*, 2 Allen [Mass.], 40; *Lehigh Valley R. Co. v. Woodring*, 116 Pa. St., 513; *Neumann v. The Calumet & Hecla Mining Co.*, 57 Mich., 97.

There is a class of cases, however, holding that the future freight earnings and profits of a ship, and various other interests to accrue in future with regard to chattels, may be assigned in equity. The future freight earnings of a railroad company, or tolls and revenue of a canal company, may be assigned. *Bittenbender v. The Sunbury & E. R. Co.*, 40 Pa. St., at page 275; *Sedam v. Cincinnati & Whitewater Canal Co.*, 2 Disney (Ohio), 309.

As between the immediate parties to this contract it may be that the plaintiff in error could claim one-half the earnings of the machine under the principle announced in the cases last above cited, so long as the same was owned by the parties to whom he sold it; but whether the contract be regarded as one of assignment or as a mortgage of the earnings of the machine, we are of the opinion that the contract could not be enforced as against the rights of a vendee of the machine from Baldwin and Volroth if he purchased without knowledge or notice of the contract.

In *Fairbanks v. Sargent*, 6 L. R. A. [N. Y.], 475, the court of appeals of New York announces the rule that the test of the existence of an equitable assignment of a claim is whether or not the debtor would be justified in paying the debt or the portion contracted about to the person claiming to be the assignee.

In the petition it is alleged that when the threshing was done one W. A. Wurtz had charge of the machine, and it is nowhere alleged that the machine is still the property of Baldwin and Volroth or that it is owned by any party having notice, actual or constructive, of plaintiff's rights. Because the petition does not state that Baldwin and Volroth, or one of them, is still the owner of the

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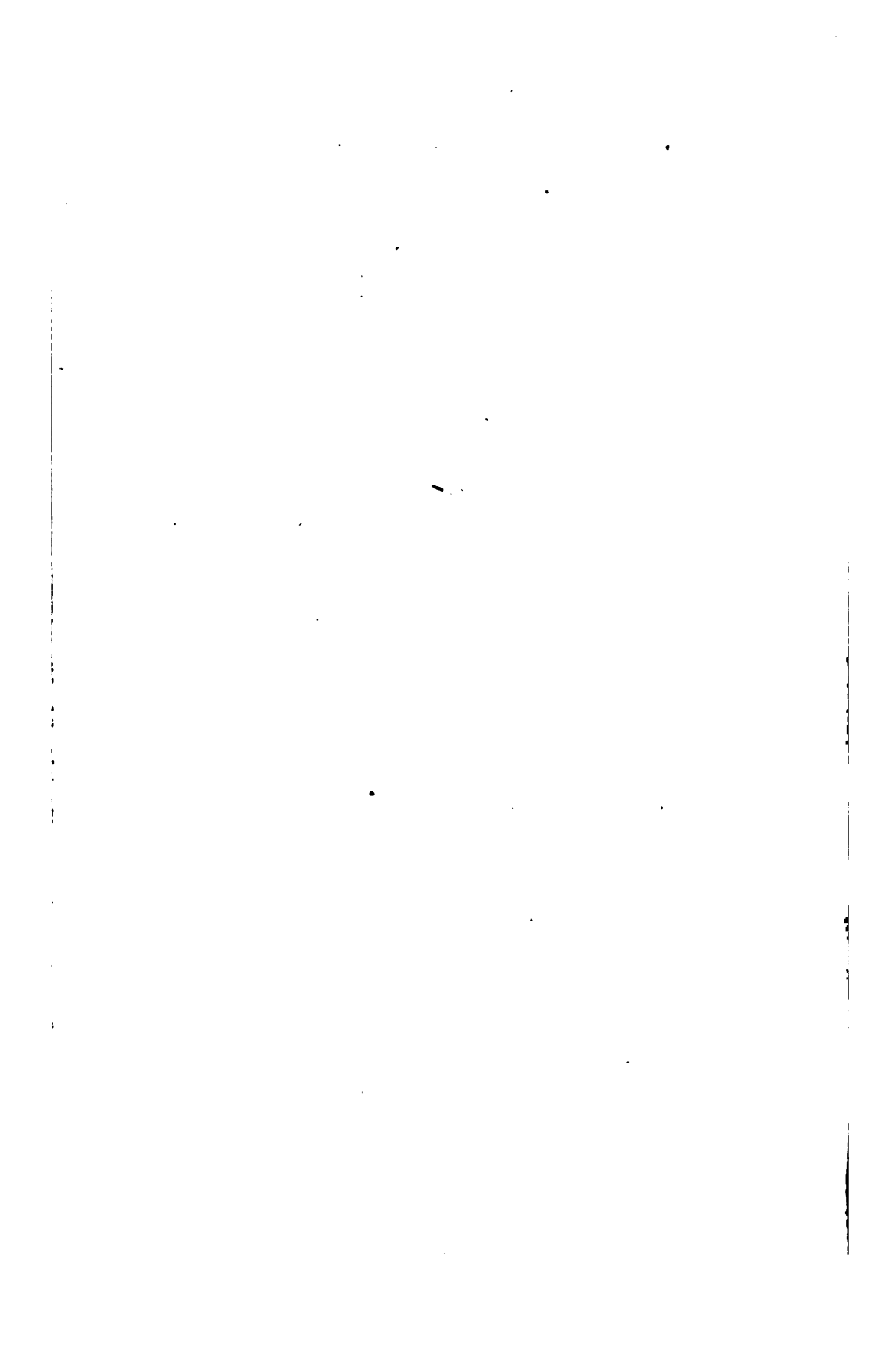
machine, or that Wurtz, the party in possession thereof when the threshing was done and therefore presumptively the owner, had notice of this contract at the time of his purchase, the petition fails to state a cause of action and the demurrer thereto was properly sustained.

We recommend the affirmance of the judgment of the district court.

AMES and ALBERT, CC., concur.

AFFIRMED.

NOTE.—In the case of *Hackney v. Hargreaves Brothers*, reported *ante*, page 676, an opinion on rehearing was filed by HOLCOMB, C. J., on May 5, 1904. In this opinion, however, the former one reported herein is upheld, and the judgment reversing the lower court allowed to stand. The opinion on rehearing will be reported in the official reports and may be found in 99 N. W. Rep., 675.—REPORTER.



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ACCEPTANCE. See ACCORD AND SATISFACTION, 2, 3. ACCOUNT STATED. PAYMENT, 1.

ACCORD AND SATISFACTION.

1. **Evidence Sufficient.** Evidence examined, and held sufficient to sustain the judgment. *Fremont Foundry & Machine Co. v. Norton* 804
2. **Payment: ACCEPTANCE.** The acceptance by the creditor of a debtor's check for less than the whole amount of a past due liquidated account, will not operate as an accord and satisfaction, unless such check is accompanied by the condition that such acceptance shall be a full satisfaction and payment of the whole debt. *Idem.*
3. ———: ———. A check for a less amount than the contract price for a steam boiler was sent by the debtor to the creditor, without any condition as to its acceptance, and with a statement in the nature of a set-off or counter-claim which, if allowed, would balance the account. The check was accepted, and the amount thereof credited on the account; the debtor was immediately notified of that fact, immediate payment of the balance was demanded and the debtor was informed that his claim would not be considered. *Held*, That the acceptance of the check was not a bar to an action to recover the balance of the debt. *Idem.*

ACCOUNT STATED.

Acceptance by Defendant: EVIDENCE. When suit is brought on an account stated, plaintiff can only recover by showing both the account and an unqualified assent of defendant to its correctness. *Sterling Lumber Co. v. Stinson*, 41 Neb., 368, 59 N. W. Rep., 888, followed. *Cahill, Swift Mfg. Co. v. Morrissey* 865

ADJOURNMENT. See MECHANICS' LIENS, 1.

ADVERSE POSSESSION. See MONEY RECEIVED, 2.

1. **Limitation of Actions: EVIDENCE SUFFICIENT.** Evidence examined, and found to sustain the finding and judgment of the trial court. *Beer v. Dalton*..... 694
2. **Occupancy: EXECUTORY CONTRACT.** The possession of land under an executory contract of purchase is not adverse to the vendor until the purchase price is paid, or until the

ADVERSE POSSESSION—Concluded.

vendee is entitled to a deed of conveyance from his vendor under the terms of the contract. *Idem.*

3. ———: REQUISITES: LIMITATION OF ACTIONS. One who claims title to land by adverse possession must show that his occupancy has for a period of ten years been open, notorious, exclusive and adverse, and under claim of title as against the true owner and the world. *Idem.*
4. Trespass: INTENT: EVIDENCE. Where a defendant claiming title to land by adverse possession entered originally without color of title or claim of right, and the acts relied on to show entry and occupation adverse to the owner are consistent with a mere intention to trespass from time to time until interfered with, his testimony that he intended to take possession and hold and occupy as owner, uncorroborated by acts necessarily indicating such intention, is not sufficient to require a finding in his favor. *Ritter v. Myers* 684

AFFIDAVITS. See ATTACHMENT, 3. EXCEPTIONS, BILL OF, 1, 2. MORTGAGES, 28, 59. NEWSPAPERS. TRIAL, 12.

AMENDMENTS. See JUDICIAL SALES, 5. MORTGAGES, 56. PLEADING, 2.

APPEAL AND ERROR. See EMINENT DOMAIN, 1, 2. EVIDENCE, 3. FORCIBLE ENTRY AND DETAINER, 1. JUSTICES OF THE PEACE. MORTGAGES, 9. TRIAL, 12, 24.

1. Appeal: CONDUCT OF ACTION IN TRIAL COURT. An appeal does not bring up for review errors in the conduct of the action in the court below. *Lau v. Blomberg* 124
2. Assignments: DIRECTING VERDICT: NOT IN MOTION FOR NEW TRIAL. The action of the trial court in refusing to direct a verdict for the defendant can not be reviewed unless assigned as error in the motion for a new trial. *Link v. Reeves* 383
3. ———. NOT ARGUED IN BRIEFS. Where the plaintiff in error makes no argument in his brief of any of the assignments of error contained in his petition, and no authorities are cited and no reasons given in support of such assignments, the judgment of the trial court should be affirmed. *Zimmerman v. Kearney County Bank* 333
4. ———: OVERRULING MOTION FOR NEW TRIAL. A judgment will not be reversed for error of law occurring at the trial, unless it is alleged in the petition in error, and shown by the record, that the court erred in overruling the motion for a new trial. *Idem.*

APPEAL AND ERROR—Continued.

- Sharp v. Call* 64
- German Mutual Fire Ins. Co. v. Palmer*..... 688
- Hansen v. Anderson* 390
- Orcutt v. McNair* 608
5. ———: **SUSTAINING DEMURRER TO ANSWER.** Where a demurrer is sustained to defendant's answer and he refuses to plead further, the action of the trial court in sustaining such demurrer will not be reviewed here unless such action is especially alleged against in the petition in error. *Harris v. Nye & Schneider Co.*..... 169
6. ———: **WAIVER.** Where the question of pleading the overruling of the motion for a new trial is raised by counsel the court will adhere to the above rule also. Where it is not so raised the court will consider the objection waived, and determine the case upon its merits. *Orcutt v. McNair*..... 608
7. **Briefs, Errors Not Discussed in.** This court will not search the record for errors that are not pointed out by counsel and discussed in the brief. *Russell v. Anderson*.... 528
8. **Data in Record in Regard to Instruction: PRESUMPTIONS.** Where the record merely shows a date of filing an instruction that it was given and was excepted to, the giving and exception will be presumed to be contemporaneous. *Skow v. Locke* 176
9. **Equity: DECREE.** In a suit in equity brought here on appeal this court has full power to render such a decree as it shall find the district court ought to have rendered. Upon a settlement of the matters in controversy by the parties to such action, with the consent of the court, such decree may be rendered as they may agree upon. *Riley Bros. Co. v. Melia*, 666
10. ———: **EVIDENCE.** An appeal in equity is not a proceeding to correct errors in the exclusion of evidence. *Kinney v. Bittinger* 817
11. ———: **MOTION FOR NEW TRIAL.** To authorize a review of errors occurring at a trial a motion for new trial is as essential in an equity as it is in a law case. *Curran v. Hageman* 779
12. ———: **PROCEEDINGS TO OBTAIN NEW TRIAL: STATUTES.** A final order by a district court made in a statutory proceeding, under section 602 *et seq.* of the Code, to obtain a new trial in an action in equity, is not reviewable by this court upon appeal. *Brown v. Croft* 133
13. **Evidence Conflicting.** A judgment entered on conflicting evidence will not be disturbed unless clearly wrong. *Dunafon v. Barber* 613
- Link v. Reeves* 383

APPEAL AND ERROR—Continued.

- Todd v. City of York*..... 763
- Battle Creek Valley Bank v. Collins*..... 38
14. ———: FAILURE TO OBJECT. Where all of the evidence offered by both parties on the trial of an issue of fact is received by the court, without objection, and such evidence is conflicting, the finding of the court based thereon, unless clearly wrong, will be sustained. *Malone v. Garver*..... 710
15. ———: ———: QUESTION OF ADMISSIBILITY. In such a case no legal question can arise on the admissibility of evidence. *Idem*.
16. ———: INSTRUCTION WITHDRAWING VITAL ISSUE OF FACT. An instruction, which withdraws from the consideration of the jury a vital issue of fact concerning which there is a conflict of evidence, is erroneous. *Dempster Mill Mfg. Co. v. Lofquist* 383
17. ———: MORTGAGES. Where irregularities in the conduct of a judicial sale are charged, the finding of the district court on conflicting evidence will not be disturbed unless clearly wrong. *Levy v. Hinz* 11
18. ———: VALUE. The finding of the trial court, upon the question of the value of real estate based upon conflicting evidence, will not be set aside unless we can say, from an examination of the record, that it is clearly wrong. *Bowman v. Bellows Falls Savings Institution*..... 583
19. ———: VERDICT: PRESUMPTIONS. Where the evidence is conflicting, and the court, upon a careful examination of it, is unable to say that a verdict based thereon is clearly and manifestly wrong, the presumption is that the jury, in their deliberations, were uninfluenced by passion or prejudice, and that they acted from proper motives, and unless there is some proof in the record to the contrary, the verdict will not be disturbed. *Sutton Exchange Bank v. Grosshans* 5
20. Evidence Rejected: OFFER OF PROOF. To secure a review in this court of a rejection of evidence, an offer of the proof sought to be elicited by the refused question must be made. *City of South Omaha v. Burke*..... 309
21. Evidence Sufficient. A finding by the trial court upon a question of fact will not be disturbed upon appeal if supported by sufficient competent evidence. *Solomon v. Solomon* 540
22. ———: FORCE AND EFFECT OF FINDING. Where the finding of the trial court is supported by sufficient competent evidence, it has the same force and effect as a verdict by a jury, and will not be disturbed unless manifestly wrong. *Payne v. Liebee* 448

APPEAL AND ERROR—Continued.

23. ———: **VERDICT CONCLUSIVE.** The verdict of a jury is uniformly held conclusive upon a disputed question of fact properly submitted, if it is sustained by sufficient competent testimony. *City of South Omaha v. Meyers*..... 699
24. **Evidence Supporting Findings.** The supreme court, though trying a case *de novo* on appeal, will not disturb the finding of the district court, unless the finding and decree can not be reconciled with any reasonable construction of the testimony. *Gadsden v. Phelps*, 37 Neb., 590, followed. *Druse v. Davey* 16
25. **Final Order: ORDER DISSOLVING INJUNCTION.** An interlocutory order dissolving a temporary injunction is not a final order or judgment reviewable in this court. *Stansbury v. Storer & Ellis* 100
26. **Findings Specific.** Refusal of the trial court to specifically find upon certain questions, *held*, under the facts in this case, not error. *Cruzen v. Pottle*..... 453
27. **Instructions: CONSTRUED TOGETHER.** Instructions should be read and construed together, and if, upon the whole, they fairly and correctly state the law applicable to the issues joined, they will be upheld. *City of South Omaha v. Meyers*, 699
28. ———: **CONSTRUCTION OF PARAGRAPHS.** The different paragraphs of the charge to a jury are to be construed together, and if, when thus construed, they correctly state the law applicable to the facts, a judgment will not be reversed because of omissions in a paragraph which does not purport to cover the entire case. *City of South Omaha v. Burke*.... 314
29. ———: **DEFECTIVE IN MATTERS NOT COMPLAINED OF.** Instructions which, as a whole, fairly submit the matter in controversy, will not require a reversal though defective in some respects not complained of. *Martin v. Connell*..... 240
30. ———: **EX MASSE.** Where error is assigned for the refusal to give a group of instructions consisting of several separate paragraphs, such assignment will only be considered so far as to ascertain that some one of the instructions was erroneous. *Canon v. Farmers' Bank of Cook*..... 348
31. ———: **UNWARRANTED.** The giving of an instruction which is erroneous, does not conform to the issues and is not warranted by the evidence, is reversible error. *Janouch v. Pence*, 867
32. **Issues: FACTS NOT IN: EVIDENCE: ESTOPPEL.** Where evidence tending to establish facts not directly put in issue by the pleading, has been admitted without objection, a party can not, on appeal to this court, be heard to complain that such facts were not an issue in the case. *President and Directors of Ins. Co. of North America v. Buckstaff*..... 632

APPEAL AND ERROR—Continued.

33. ———: IN APPELLATE COURT. A motion to strike out a matter of defense, contained in an answer filed in the district court, for the alleged reason that it was not in issue in the county court where the cause was first tried, should be overruled where it appears that such matter was pleaded in the lower court, and is only set out more fully and in detail in the pleading to which the motion is directed. *Martens v. Pittock* 770
34. Judgments: VACATION IN EQUITY: ESTOPPEL. Where a party institutes a suit in equity to vacate a judgment at law, and from a decree rendered modifying such judgment he prosecutes no appeal, he will be barred from further prosecuting error from an adverse ruling on a motion which he had previously made to vacate the same judgment. *Kellogg & Co. v. Spargur* 595
35. Jurisdiction: HOW OBTAINED. In equitable actions this court acquires jurisdiction, on appeal, by the filing of a duly certified transcript within the statutory time; and when duly certified transcripts of the record in two or more cases are included under one cover, and filed in due time, jurisdiction attaches over each case. *Hall v. Moore* 574
36. ———: JUSTICES OF THE PEACE. Where the jurisdiction of a justice of the peace appears on the face of the record, error, to be available, must appear affirmatively. *Martin v. Mershon* 174
37. Law of the Case: ADJUDICATED QUESTIONS: INJUNCTION. Where the defendants appeal from a decree in favor of the plaintiff, allowing an injunction, which is contingent on the doing of certain acts by the plaintiff, and the decree is affirmed in this court, such decree is conclusive on the parties as to all matters thereby adjudicated, on an appeal from a subsequent order in the same case. *Commercial State Bank of Crawford v. Ketcham* 839
38. Mechanics' Liens: PLEADINGS AND FINDINGS SUFFICIENT. Findings of the court examined, and held to be sustained by the pleadings and sufficient to support the decree. *Storer & Ellis v. Boggs Brothers* 301
39. Mortgages: CONFIRMATION. Record examined, and held to present no valid objections to an order confirming a sale of real estate. *Vroom v. Lewis* 585
40. Motion: OVERRULING OF PART: FAILURE TO EXCEPT. Where a motion has been sustained in part and overruled in part, the maker of it, who has taken no exceptions, can not complain of error in its overruling. *Curran v. Hageman* 779
41. New Trial, Motion for: FAILURE TO FILE. In order to re-

APPEAL AND ERROR—Continued.

- view the proceedings of the district court in a trial of issues of fact, by a petition in error, a motion for a new trial must be filed therein so as to afford the court an opportunity to correct error in its own proceedings. *Lau v. Lindsey*..... 681
42. ———: ———. Where no motion for a new trial is filed and the case is brought to this court by a petition in error, the judgment of the lower court will be affirmed if sustained by the pleadings. *Idem*.
43. ———: INDIVISIBLE. A motion for a new trial is indivisible, and where it can not be allowed as to all, it must be overruled as to all. *Kyner v. Laubner*..... 370
44. ———: NECESSITY FOR. This court will not review alleged errors occurring during the trial of a cause in the district court, by petition in error, unless a motion for a new trial was made in the trial court and a ruling obtained thereon. *Cedar County v. Goetz*..... 172
45. ———: ORAL. An oral motion for a new trial is not recognized in the practice of this state. Such a motion will not justify the granting of a new trial, nor will the overruling of such a motion be sufficient to present errors of law to either the trial or a reviewing court. *Idem*.
46. Objections to Evidence Not in Briefs. Objections to the admission of evidence made at the trial, but not argued or mentioned in briefs filed in this court, will not be considered. *Western Union Telegraph Co. v. Church*..... 22
47. Order Opening Decree: FINAL ORDER. "There can not be a review of an order of the district court opening a judgment and permitting an answer to be filed in the case until there has been a further order or judgment in its nature final." *Merle & Heaney Mfg. Co. v. Wallace*, 48 Neb., 886. *Browne v. Croft* 134
48. Pleading: HERE FIRST ASSAILED: CONSTRUCTION. A petition when assailed for the first time in this court will be liberally construed. *First Nat. Bank of Madison v. Tompkins* 334
49. Prejudice. A judgment will not be reversed for errors which could not possibly have prejudiced the rights of the party complaining. *City of South Omaha v. Meyers*..... 699
50. ———: EVIDENCE. Certain testimony admitted over objections examined, and held not to have prejudiced the party complaining. *Idem*.
51. Reference: CONFLICTING EVIDENCE. The findings of fact of a referee, on conflicting evidence, confirmed by the district court after hearing on exceptions thereto, will not be disturbed on appeal. *Creedon v. Patrick* 459

APPEAL AND ERROR—Concluded.

52. **Replevin Affidavit: DEFECTS NOT SHOWN.** Defects in a replevin affidavit not brought to this court with the record will not be considered. *Skow v. Locke* 176
53. **Time for Perfecting.** The time for perfecting an appeal in equitable actions begins to run at the date on which the final decree is entered of record. *Hall v. Moore* 574
54. **Transcript: ORIGINAL FILES: STATUTES.** The original files and papers are not a transcript within the meaning of section 586, Code of Civil Procedure, and can not take the place thereof nor supply defects therein. *Brabham v. County of Custer* 801
55. **Trial De Novo.** The perfecting of an appeal to this court from a decree of the district court in a suit in equity, together with the filing and approval of a supersedeas bond, operates to suspend such decree, and the case is thereupon pending here for trial *de novo*. *Riley Bros. Co. v. Melia*.... 666
56. ———: **DEFINITION.** By the perfecting of such appeal the parties are placed in the same situation, and their rights are the same, as they were at the time of the commencement of the action. *Idem*.
57. **Trial to Court: PRESUMPTION AS TO EVIDENCE.** In a cause tried to the court without the intervention of a jury, the presumption is that the trial court considered only competent testimony in arriving at a decision. *Triska v. Miller*, 463
58. **Verdict Final.** The verdict of a jury upon questions of fact submitted to them is final, unless such verdict is clearly and manifestly wrong. *Sutton Exchange Bank v. Grosshans*.... 5
59. **Verdict Only One Possible: INSTRUCTIONS: PREJUDICE.** Where the verdict returned is the only one which under the pleadings and proof could have been allowed to stand, errors in the giving of instructions are without prejudice. *Beer v. Dalton* 694
60. **Witnesses: CROSS-EXAMINATION: PREJUDICE.** Certain rulings of the trial court refusing to permit the cross-examination of a witness examined, and held not prejudicial error. *Triska v. Miller* 463
61. ———: **EXCLUSION: FAULT OF PARTY.** As the trial court is in a better position to pass on the question how far a party has been at fault in case of violation of an order separating witnesses, this court will not interfere with its determination if it may be sustained by any inference reasonably deducible from the evidence. *Murray v. Allerton*..... 291

APPRAISAL. See MORTGAGES, 10-25.

APPROPRIATIONS. See MUNICIPAL CORPORATIONS, 2, 6.

ARREST.

1. **Instructions Approved.** Instructions set out in the opinion, examined, and *held* not erroneously given. *Kyner v. Laubner*, 370
2. **When Private Person May:** INSTRUCTIONS. An instruction purporting to give to the jury the instances in which a private person may make an arrest without a warrant is not objectionable because it is confined to the ground upon which the defendant sought to justify. *Idem.*
3. ———: STATUTES. Under the provisions of section 284 of the Criminal Code, a private person may make an arrest without a warrant only in case the offense, for which the person suspected is arrested, has in fact been committed. *Idem.*

ASSESSMENTS. See BENEFICIAL ASSOCIATIONS, 1-3. TAXATION, 8, 9.

ASSIGNMENTS. See APPEAL AND ERROR, 2-6. TAXATION, 7.

During Pendency of Action: PARTIES. Where the interest of the plaintiff is transferred to another during the pendency of the cause, the suit may be prosecuted to its termination in the name of the original plaintiff, or the transferee may be substituted as plaintiff. *Parker v. Taylor*..... 318

ASSUMPSIT. See LANDLORD AND TENANT, 1.

ATTACHMENT. See CREDITORS' SUIT, 1, 4, 6.

1. **County Court: POWER AND AUTHORITY:** STATUTES. The practice in attachment cases, in the county court, where the amount involved is above the jurisdiction of a justice of the peace, by chapter 20 of the Compiled Statutes, is made the same as that which prevails in the district court, and the county court has full power to hear motions to dissolve attachments and make the proper orders thereon. *Dittman Boot and Shoe Co. v. Graff*..... 165
2. **Discharge of, by Finding and Judgment.** A finding and judgment for defendant *ipso facto* discharges an attachment. *Alpirn v. Goodman* 397
3. **Evidence as to Truth of Affidavit:** DISCRETION OF COURT. Where the defendant, in his motion to dissolve an attachment, denies the truth of the facts stated in the affidavit on which the attachment was obtained, the manner of taking the evidence, on the hearing of the motion, is within the discretion of the court. *Dittman Boot and Shoe Co. v. Graff*, 165
4. **Ownership:** EVIDENCE SUFFICIENT. Evidence examined, and *held* sufficient to support a decree in favor of plaintiff to the amount of the judgment lien. *Haines & Co. v. Stewart*..... 216
5. ———: DETERMINATION OF. The mere fact that a party claims to be the owner of attached property, does not give

ATTACHMENT—Concluded.

him the right to intervene in the attachment, and thus have the question of his ownership determined in the attachment suit. *Kimbrow v. Clark*, 17 Neb., 403. *Idem*.

6. ———: **SUBSEQUENT OBJECTION TO JURISDICTION.** Where one of several defendants denies separately plaintiff's allegations and claims in his answer sole ownership of attached property, and plaintiff traverses the claim of ownership and that question is litigated in both county court and on appeal in district court, without objection, it is too late after final judgment in favor of that defendant to assert that the district court was without jurisdiction to determine ownership of the property in that action. *Alpirn v. Goodman*..... 397
7. ———: **VOLUNTARY SUBMISSION OF QUESTION.** This rule does not preclude the parties from voluntarily appearing and presenting the issue of ownership under the title of the original action, and when jurisdiction is thus acquired, and a trial had without objection, it is the duty of the court to enter a judgment on the merits. *Haines & Co. v. Stewart*..... 216
8. **Property in Possession of Stranger: REDELIVERY BOND: TRIAL OF RIGHT OF PROPERTY: STATUTES.** A stranger to an attachment suit, in whose possession the attached property is found, who gives a redelivery undertaking under section 930, Code of Civil Procedure, can not thereafter assert ownership and try the right of property under sections 945 and 996. *Allyn v. Cole* 233

ATTORNEY AND CLIENT. See JUDGMENT, 1. MALICIOUS PROSECUTION, 1. WITNESSES, 2.

1. **Assistant Counsel in Other County: LIABILITY OF CLIENT FOR FEES.** An attorney retained to conduct a case which is pending in another county, may properly employ local counsel to attend to necessary formal matters, such as procuring orders, attending calls of the docket, and the like, and charge the fees paid such counsel as expenses, where it appears that the fees paid were less, or at least not more, than the expense which would have been incurred had he gone in person. *Dillon v. Watson*..... 530
2. **Employment of Attorney by Attorney: LIABILITY OF CLIENT.** A client is not liable for fees of other counsel employed by those whom he has retained to conduct his case unless he authorizes or ratifies such employment. *Idem*.
3. **Extent of Employment: PARTNERSHIP.** In the absence of stipulations evidencing a different intent, an employment of an attorney to prosecute a claim to a recovery, terminates with the rendition of a judgment thereon and the exhaustion of the usual legal process upon the judgment. It does not

ATTORNEY AND CLIENT—Concluded.

include the prosecution of subsequent actions and proceedings to reach the property of the judgment debtor, or to enforce liability against his sureties upon supersedeas. *Lamb v. Wilson*..... 505

ATTORNEYS. See PARTNERSHIP, 1-6.

AWARD. See EMINENT DOMAIN, 1-3.

BANKRUPTCY. See CREDITORS' SUIT, 3, 11, 12.

1. **Actions by Trustee in State Courts.** Actions by a trustee in bankruptcy to recover property in the hands of third parties and which he claims as a part of the bankrupt estate, must be prosecuted in the state court unless the defendants in such actions consent that the same may be prosecuted in the federal court. *Bardes v. Hawarden Bank*, 178 U. S., 525. *McIntyre v. Malone* 159
2. **Application for Stay in State Court.** The state court in which the suit is pending is the proper tribunal to which application for a stay should be made. *In re Geister*, 97 Fed. Rep., 322. *Idem*.
3. **Contract of Conditional Sale.** As against a conditional vendor of chattels, the filing of a petition in bankruptcy by or against the vendee has the effect of the seizure of the goods upon judicial process against the latter. *Logan v. Nebraska Moline Plow Co.*..... 526
4. ———: **UNRECORDED: CONSTRUCTION OF STATUTES.** The federal bankruptcy law giving to the trustee the title to all property which the bankrupt could have transferred prior to the filing of the petition or which could have been levied upon for his debts, places the trustee as against an unrecorded conditional sale contract in the position of a judgment creditor. *Idem*.
5. **Insolvency Proceedings Under State Law.** The bankruptcy act of 1898 does not affect proceedings commenced under the state insolvency law before its passage. *Hood v. Blair State Bank* 432
6. **Stay in State Court: DISCHARGE A RELEASE OF CLAIM.** The state court should stay proceedings in a suit pending against a person against whom proceedings in bankruptcy have been commenced, either on his own petition or by his creditors, if the pending suit is founded upon a claim for which a discharge in bankruptcy would be a release. *McIntyre v. Malone* 159

BANKS AND BANKING.

1. **Acts of Officer Outside of Bank: LIABILITY OF BANK.** As a general rule, acts done by an officer of a bank away from its

BANKS AND BANKING—Concluded.

- place of business, and not authorized or ratified, are not binding upon it. *Jones v. First Nat. Bank of Lincoln*..... 73
2. **Acts of Officer Outside of His Authority: LIABILITY OF BANK.** The acts of a bank officer, outside the usual scope of his authority, in a matter to which it is no party and of which it is not chargeable with notice, do not bind the bank. *Idem.*
 3. **Fraudulent Act of Employee: NOTICE.** A bank is not chargeable with notice of the fraudulent act of its employee, outside the scope of his authority and in furtherance of his own personal designs, solely because he is an employee. *Idem.*
 4. **Paying Deposit to Wrong Person: ELECTION OF REMEDIES.** Prosecution to final judgment of a suit against the person to whom the money was paid is an election to treat the payment by the bank as proper and authorized, and will bar a subsequent suit against the bank for the amount of the deposit. *Idem.*
 5. ———: **ELECTION OF PARTY TO BE SUED.** A depositor, who claims that a bank has paid out his money to a person not entitled to receive it, has an election to sue the bank or the person who received the money; but can not proceed against each, unless in case of conspiracy or joint wrong. *Idem.*

BASTARDY.

1. **Civil Proceeding: EVIDENCE: PREPONDERANCE.** A prosecution for bastardy is a civil and not a criminal proceeding; hence, the paternity of the child need only be established by a preponderance of the evidence and it is not necessary that it should be established beyond a reasonable doubt. *Priel v. Adams* 305
2. **Evidence Sufficient.** Evidence examined, and held sufficient to support the judgment. *Idem.*
3. **Instructions: PREJUDICE.** Instructions examined, and held not prejudicial. *Idem.*
4. **Proof of Birth: PRESUMPTIONS.** In a prosecution for bastardy when it is proven that a child was born upon a certain day it may be inferred that it was born alive. *Idem.*

BENEFICIAL ASSOCIATIONS.

1. **Insurance: ASSESSMENTS: FORFEITURE: RIGHT TO RECEIVE IN ADVANCE.** Where the financier of a lodge has accepted on deposit a sum of money from a member to cover anticipated assessments, agreeing so to apply it, a forfeiture can not be predicated upon the failure of the member personally to tender the amount of an assessment when due, if the

BENEFICIAL ASSOCIATIONS—Continued.

- financier has money in his hands to meet the assessment; and it is immaterial that the duties of his office did not require him to receive money for assessments before they were payable, if in doing so he has not contravened any positive law of the organization. *Grand Lodge A. O. U. W. v. Scott*.. 851
2. ———: ———: **FORMER DECISION.** Former decision rendered in this case (*Grand Lodge Ancient Order of United Workmen v. Scott*, ante, page 845, 93 N. W. Rep., 190) not adhered to. *Idem*.
3. ———: ———: **PAYMENT IN ADVANCE: SUSPENSION.** A member of a beneficial association in good standing deposited with the financier of his local lodge a sum of money sufficient to pay his assessments and dues for several months in advance. The financier accepted the money, agreeing so to apply it. The member then left the town of his residence, and during his absence the financier returned the money so deposited, less one assessment, to the beneficiary named in the member's certificate, and thereupon the member was marked suspended for failure to pay the next regular assessment. *Held*, That the suspension was unauthorized and void. *Idem*.
4. ———: **PLEADING: EVIDENCE NOT PRESERVED: PRESUMPTIONS: STATUTES.** Where a plaintiff's allegations in a petition to open up a judgment for fraud of the successful party in obtaining it, filed under section 602 of the Code, are sufficient, and the evidence taken at the hearing is not preserved, the action of the trial court in setting aside the judgment and granting a new trial will be presumed to have been on sufficient evidence. *Idem* 845
5. ———: **SUSPENSION ILLEGAL: CONSENT: EVIDENCE INSUFFICIENT.** While a member of a beneficial association who is illegally suspended may acquiesce in and consent to the suspension, so as to forfeit his rights under a benefit certificate, the evidence in this case is examined and *held* not to warrant an inference that the suspended member acquiesced in or consented to the illegal suspension. *Idem* 851
6. ———: ———: **CONTINUATION OF MEMBERSHIP.** One who is illegally suspended from a beneficial association may treat the suspension as illegal and void, his membership continuing, if he does not acquiesce in and consent to the illegal suspension, and he need not seek reinstatement. *Idem*.
7. ———: ———: **TENDER OF SUBSEQUENT DUES.** A forfeiture can not be predicated upon an omission of one party brought about by the conduct of the other party; so that where a member has been illegally suspended from a beneficial asso-

BENEFICIAL ASSOCIATIONS—Concluded.

ciation and dues tendered by him are refused, the grounds for the refusal being continuous in their nature, his failure thereafter to tender dues can not be made the basis of a forfeiture until after notice of a readiness to receive the dues has been brought home to the suspended member. *Idem*.

8. ———: ———: **WAIVER.** The evidence in this case showing an unauthorized suspension of the insured in 1893, but also showing that under a change of constitution, January 1, 1894, by which \$1 became payable monthly without notice on penalty of suspension and forfeiture if such payment was not made, and that eleven months elapsed under this constitution without any attempt to comply with it on assured's part before his death, *held*, that his rights were forfeited and there could be no recovery by his beneficiary. *Idem*.... 845

BILLS AND NOTES. See EVIDENCE, 1. MORTGAGES, 69. TRUSTS, 1.

1. **Action by Indorsee: DENIAL OF OWNERSHIP: BURDEN OF PROOF.** Where, in an action by the alleged indorsee of a promissory note, the defendant denies the plaintiff's ownership, the burden of proof is upon plaintiff to show by competent evidence that the indorsement on the note is that of the payee. *Payne v. Liebee*..... 448
2. **Evidence as to Payment by Labor: ADMISSIBILITY.** Where a promissory note in the usual form calls for the payment of money, evidence that it was to be paid in work and labor can not be received against the objection of the holder. *Vradenburg v. Johnson* 326
3. **Extension of Time of Payment: EVIDENCE INSUFFICIENT.** Evidence examined, and *held* not to support the claim that time of payment of notes had been extended. *Parker v. Taylor* 318
4. **Husband and Wife: DEFENSE OF COVERTURE.** In an action against a married woman on a note executed by her as surety for another, coverture is a complete defense, unless it be shown that such note was made with the intention on her part of binding her separate estate for its payment. *Smith v. Bond*, 56 Neb., 529, followed. *Kershaw v. Barrett*, 36
5. ———: **SURETY: EVIDENCE SUFFICIENT.** Evidence examined, and *held* to support the findings and judgment of the trial court. *Idem*.
6. **Indorsements: EVIDENCE SUFFICIENT.** Evidence examined, and found to sustain the finding and judgment of the trial court. *Payne v. Liebee*..... 448
7. **Judgment: CONFESSION BY ATTORNEY: EVIDENCE SUFFICIENT.** Evidence examined, and *held* sufficient to sustain the verdict. *National Exchange Bank v. Wiley*..... 716

BILLS AND NOTES—Concluded.

8. ———: FOREIGN, ACTION ON: WARRANT OF ATTORNEY IN NOTE TO CONFESS: LIMITATIONS. In an action on a foreign judgment, taken under a warrant of attorney authorizing any attorney at law to appear in any court of record, and confess judgment against the makers of a certain note, in favor of the holder thereof, *held* (1) that such warrant was not a general authority to appear and confess judgment, in any action instituted on the note, but was limited to the confession of a judgment in favor of the holder; (2) that the defendant was not estopped, by the judgment, to deny that the plaintiff was the holder of the note when such judgment was confessed; (3) that a judgment, confessed in favor of one, who at the time was not the holder of the note, was void for want of jurisdiction. *Idem*.
9. Payment Indorsed by Mistake: APPLICATION OF PAYMENT. An indorsement of a payment on a note made without the maker's knowledge or assent is not an irrevocable application of the payment to that note where the payee also holds other obligations against the payor. *Lau v. Blomberg*..... 124
10. ———: ERASURE. Indorsements of payment entered by mistake or inadvertence on a note do not become a part of the instrument and their erasure does not avoid the note. *Idem*.
11. Principal and Surety: SET-OFF AND COUNTER-CLAIM: EVIDENCE SUFFICIENT. Evidence examined, and *held* sufficient to sustain the judgment. *Anderson v. Sarver*..... 784

BOARD OF TRADE. See GAMING, 1-7.

BONA FIDES. See FRAUDULENT CONVEYANCES, 3, 6. PRINCIPAL AND AGENT, 2.

BONDS. See ATTACHMENT, 8. LIMITATION OF ACTIONS, 1. MUNICIPAL CORPORATIONS, 1. WATERS AND WATER COURSES, 1.

- . Irrigation: DATE: CONCLUSIVENESS: NOTICE. While a recital in bonds that they were ordered to be issued on a certain date would be notice of their invalidity to all persons acquiring them, if issued prior to the time fixed by law, the recital is not conclusive, but, if such was the fact, it may be shown that they were not ordered to be issued and were not issued until after the expiration of the statutory period. *Chicago, B. & Q. R. Co. v. Dundy County*..... 391

BOUNDARIES.

1. Surveys: FIELD NOTES: EVIDENCE SUFFICIENT. Evidence examined, and *held* to warrant a finding that a channel indicated by the field notes of an original survey as constituting the boundary line between parties could no longer

BOUNDARIES—Concluded.

- be located by either natural or artificial landmarks. *Shrake v. Laftin* 489
Mensen v. Laftin 489
2. ———: GOVERNMENT CORNERS: BURDEN OF PROOF. Government corners fixed by a United States surveyor at the time of the original survey will control the field notes of the survey taken at the time the corner was erected and will control the field notes or courses and distances of any subsequent survey. Such corner, if identified by the proofs, is the best evidence of where the line should be. But in the absence of such corner, or of satisfactory proof of its location, the field notes of the survey will govern and determine the true line, and such field notes and government plats in such case are *prima facie* evidence of its true location, and the burden is then shifted to the party who wishes to establish the corner at a place different from that called for by the field notes and government plat of the original survey. *Knoll v. Randolph*..... 599
3. ———: ———: ———. On rehearing the law of the case as announced in the former opinion is adhered to, but the judgment of the district court is reversed because of a misunderstanding as to the point at which the verdict of the jury fixed the corner in dispute. *Idem*..... 603
4. ———: MEANDERING LINES: INSTRUCTIONS. An instruction that the jury were to decide from the evidence whether or not certain meandering lines, located by the government surveyor, could be identified where such lines indicated the margin of a certain channel, does not substitute such meandered lines for the center of the channel as a boundary, where the jury are expressly told that, if they can locate such channel, its center is to serve as the boundary between the parties in the action. *Shrake v. Laftin*..... 489
Mensen v. Laftin 489
5. ———: REJECTION OF. A survey will not be rejected merely because the county surveyor commenced the measurement of a line at its northern extremity, where that extremity is well ascertained, instead of going over it from the south as was done in the original survey. *Idem*.
6. ———: ———. The identification of a section corner as a starting point, made by the county surveyor upon examination of the ground and upon sworn evidence, will not be rejected in the absence of any showing of mistake or error. *Idem*.

BRIEFS. See **APPEAL AND ERROR**, 3, 7, 46.

BROKERS. See FRAUDS, STATUTE OF, 3. GAMING, 1, 5, 7.

Listing Real Estate for Sale as a Whole: SALE BY OWNER OF PART: COMMISSION. Where it appears that a piece of property has been listed with a real estate broker as a whole, and his sole authority is to negotiate a sale as a whole, and his negotiations to so sell it to a particular customer have been broken off, a subsequent sale some months later of a portion, only, of the property by the owner to the purchaser with whom the broker's negotiations were had, but independently, will not entitle the broker to a commission.
Frenzer v. Lee 69

BURDEN OF PROOF. See BILLS AND NOTES, 1. BOUNDARIES, 2, 3. MORTGAGES, 57, 58. MUNICIPAL CORPORATIONS, 12. TRIAL, 2.

CAVEAT EMPTOR. See VENDOR AND PURCHASER, 1.

CHAMBERS. See MECHANICS' LIENS, 2.

CHANGE OF VENUE. See JUDGMENT, 9.

CHattel MORTGAGES. See REPLEVIN, 1, 2.

1. **Description: VALIDITY.** A man owning a herd of two hundred cows and a hundred and forty-three calves, executed a mortgage containing the following description: "Two hundred (200) head of native cows, in ages from three to seven years; some branded L and others SH; also with one hundred head of above mortgaged cows are included in this mortgage one hundred head of their calves, which are to be branded SH. The above described chattels are now in my possession on," etc. Held, That this description was so indefinite as to be void as against subsequent purchasers of a part of the herd of calves, without actual notice of the instrument. *First Nat. Bank of Chadron v. Hughes* 823

2. **Failure to Release: PENALTY IN EQUITY.** A claim not reduced to judgment, for the statutory penalties for a failure to release paid chattel mortgages, does not furnish such a cross-demand as can be used for the basis of an equitable action to cancel another mortgage between the same parties which has not been paid. *Meredith v. Lyon & Healy* 485

3. **Foreclosure: DAMAGES FOR FAILURE TO COMPLY WITH STATUTE.** Where a mortgagee, in the foreclosure of his mortgage, fails to comply in an essential particular with the requirements of the statute, he will be liable to the mortgagor for any damages the latter may thereby sustain. *McCormick Harvesting Machine Co. v. Preitauer* 230

4. —: **EVIDENCE SUFFICIENT.** Evidence examined, and found to sustain the findings and judgment of the trial court. *Idem.*
Battle Creek Valley Bank v. Collins 38

CHattel Mortgages—Concluded.

5. ———: SALE IN FOREIGN COUNTY: FILING: LIABILITY OF MORTGAGEE. Where a mortgagee takes mortgaged property to another county and there sells it without first filing his mortgage in such other county, the mortgagor may maintain an action against the mortgagee, and recover the value of the property taken less the amount of the debt due to the mortgagee. *Idem.*
6. ———: ———: ———: STATUTES. By the provisions of section 6, chapter 12, Compiled Statutes, 1899, before mortgaged chattels can be sold in a county other than that in which the mortgage was originally filed, the mortgage must be filed in the office of the county clerk of the county where the property is to be sold. *Idem.*
7. Oral: VALIDITY. An oral chattel mortgage is good as between the parties thereto; it is invalid only as to creditors and subsequent purchasers in good faith. *Reiss v. Argubright* 756
8. ———: ———: "CREDITOR," MEANING OF. Creditor in this connection means judgment, execution or attachment creditor; a subsequent mortgagee with notice is not so regarded. *Idem.*

COLLATERAL ATTACK. See JUDGMENT, 10. JUDICIAL SALES, 2, 3.

COMMISSION. See BROKERS.

COMPENSATION. See PARTNERSHIP, 1-4.

COMPUTATION. See TRIAL, 29.

CONFESSION. See BILLS AND NOTES, 8.

CONSIDERATION. See COSTS, 1. FRAUDS, STATUTE OF, 2. PARTNERSHIP, 7. PAYMENT, 2. TRUSTS, 1.

CONSTRUCTION. See APPEAL AND ERROR, 27, 28, 48. CONTRACTS, 3-5. WILLS, 2.

CONTEMPT.

1. Commission in Presence of Court: RECORD. Where the prosecution for contempt proceeds on the theory that such contempt was committed in the presence of the court, the record is insufficient unless it shows that the offense was thus committed. *Ogden v. State* 886
2. Formal Accusation: NECESSITY FOR. While a formal accusation is not necessary to a prosecution for contempt committed in the presence of the court, the record must show that such an offense has been committed in order to sustain a conviction. *Idem.*

CONTEMPT—Concluded.

3. **Pleading Conclusions: LANGUAGE SET OUT.** A recital that the accused addressed insulting and menacing language to the court is a mere conclusion; the language itself should be set out to enable the reviewing court to determine whether it was actually contemptuous. *Idem.*

CONTINUANCE. See EXCEPTIONS, BILL OF, 1. REFERENCE, 1.

- Overruling Motion for.** Action of the trial court, in overruling plaintiff's motion for continuance, approved.

Humphrey v. Humphrey 467

CONTRACTS. See ADVERSE POSSESSION, 2. BANKRUPTCY, 3. 4. EVIDENCE, 10. EXECUTORS AND ADMINISTRATORS. MUNICIPAL CORPORATIONS, 3. PARTNERSHIP, 4, 6, 7. PLEADING, 3. SALES, 1.

1. **Attorney and Client: EVIDENCE SUFFICIENT.** Certain findings of fact *held* to be supported by the evidence. *Dillon v. Watson* 530

2. **Building Contract: ORAL EVIDENCE TO SHOW UNDERSTANDING AS TO CERTAIN MATERIALS.** A written building contract provided that the work was to be done according to certain plans and specifications to the satisfaction of one of the parties "in design, workmanship, and finish." The plans and specifications contained no details as to certain materials required, and nothing was specified as to where they were to be obtained. *Held*, That parol evidence was admissible to show that at the time the contract was made such party insisted that said materials must be obtained in the east because he considered the eastern designs, workmanship and finish superior, and to show that a subsequent purchase of such materials in the east was in pursuance of the understanding when the contract was made and to comply with the requirements he was empowered to make by its express terms. *Creedon v. Patrick* 459

3. **Construction: COURT AND JURY, PROVINCE OF.** Although the construction of instruments is for the court, where a written contract requires extrinsic evidence to explain its terms, the interpretation to be given in view of such evidence is a question of fact. *Dillon v. Watson* 530

4. —: **EVIDENCE SUFFICIENT.** Evidence and contract examined, and *held* that the construction given to the contract and the meaning ascribed to the word "proceeds" therein by the trial court, are reasonable and should be approved. *Wheeler & Wilson Mfg. Co. v. Winnett* 293

5. —: **WORD "PROCEEDS."** The word "proceeds" is a word of equivocal import. Its construction depends very much upon the context and the subject-matter to which it is applied. *Idem.*

CONTRACTS—Concluded.

6. **Evidence: PAROL, TO VARY TERMS.** Where neither fraud nor misrepresentation is practiced in securing a subscription contract, its terms can not be changed or modified by parol evidence. *Mefford v. Sell*..... 556
7. **Presumption of Knowledge of Contents.** All men are presumed to read and understand the terms of contracts entered into by them, and in the absence of fraud, deception or other undue means in procuring their execution, they will not be permitted to escape a liability clearly expressed by the language of the contract. *Cruzen v. Pottle*..... 453
8. **Specific Performance: PLEADING.** Petition asking specific performance of a contract for the sale of real estate examined, and *held* subject to demurrer. *Kennedy v. Parmele*. 402
9. **Subscriptions: BINDING EFFECT OF.** Where the power has been delegated to a committee to accept a mill, to which a subscription bonus has been given, and to declare the subscriptions due and payable, in absence of fraud or mistake, the action of the committee will bind the subscribers. *Mefford v. Sell* 566
10. ———: **INSTRUCTIONS APPROVED.** Record examined, and *held* that the court did not err in giving and refusing instructions. *Idem*.
11. **Written: INSTRUCTIONS APPROVED.** Instruction complained of examined, and *held* that it was properly given. *Martens v. Pittock* 770
12. ———: **ORAL: PLEADING IN REPLY: EVIDENCE: FRAUD OR MISTAKE.** Where parties have had verbal negotiations which have afterwards been reduced to writing, the written agreement will be taken to control as their final determination, and the parties will be bound thereby in the absence of fraud or mistake. But where such written agreement is pleaded in a reply as a matter of defense to the allegations contained in an answer, evidence of fraud or mistake in procuring such agreement will be received without further pleading. *Idem*.

CONVERSION. See GAMING, 1.

1. **Pleading: ADMISSIONS AND DENIALS IN ANSWER: RIGHT TO OPEN AND CLOSE.** Where in an action for conversion, defendant admits possession of the property, but sets up a right to it derived from plaintiff, and denies generally, the right to open and close at the trial is in plaintiff. *Johnson v. Nelson* 260
2. **Pleading and Evidence Sufficient.** Pleadings and evidence examined and found to support the judgment. *Merunde v. Behnke* 214

CORPORATIONS. See EXPLOSIVES, 1, 2. FRAUDULENT CONVEYANCES, 3.

1. **Explosives: NEGLIGENCE: PERSONAL LIABILITY OF DIRECTORS.** The directors of a corporation, by the mere act of employing another to give a fireworks exhibition for and on behalf of such corporation on its grounds, are not made personally liable for the negligent acts of the person thus employed to give such exhibition. *Bianki v. Greater American Exposition* 656
2. **Independent Contractor: DAMAGES FROM EXPLOSIVES: PLEADING.** *Held*, That the facts stated in the plaintiff's petition were not sufficient to show that the corporation employed was an independent contractor within the meaning of the law, and that such defense was not raised by demurrer. *Idem*.
3. **Pleading Corporate Character: GENERAL DENIAL.** A general denial does not put in issue the corporate character of the plaintiff or its capacity to sue. *Chamberlain Banking House v. Kemper, Hundley & McDonald Dry Goods Co.* 549
4. **Stock Subscription: LIMITATION: CLAIM AGAINST ESTATE.** *Estate of Fitzgerald v. Union Savings Bank*, 65 Neb., 97, 90 N. W. Rep., 994, followed in a case of the same nature. *Estate of Fitzgerald v. Union Savings Bank.* 123
5. **Subscriptions to Stock of Another Corporation.** Unless authorized by statute, a corporation has no power to subscribe to the capital stock of another corporation, and such a subscription is not binding. *Nebraska Shirt Co. v. Horton.*.... 838
6. ———: **REPUDIATION: ESTOPPEL.** Where no money or property of any kind has been acquired or held by virtue of the transaction, mere inaction and neglect to repudiate it will not estop the subscribing corporation when sued upon such a subscription. *Idem*.

COSTS. See MORTGAGES, 61. PAYMENT, 1. TAXATION, 5.

1. **Attorneys' Fees: DISCONTINUANCE OF CAUSE: CONSIDERATION.** Discontinuance of a pending cause and agreement not to prosecute any further claim are sufficient consideration for a promise to pay accrued costs and attorneys' fees. *Wellage v. Abbott* 157
2. **Retaxing: DISCRETION: STATUTES.** The discretion conferred on the courts by section 623 of the Code is not an arbitrary, but a legal one, to be exercised within the limits of legal and equitable principles. Following *Wallace v. Sheldon*, 56 Neb., 55. *State v. Holm.* 763

COUNTIES. See HIGHWAYS, 1, 2. PAUPERS.

Unconstitutional Act Attaching Territory: ACTS OF RECORDER. An unconstitutional act attaching territory to a county, accepted and acquiesced in, will suffice to render the acts of the register of deeds of such county, as to such territory, done before the law was declared unconstitutional, acts of a *de facto* officer. *State Bank of Pender v. Frey*..... 83

COURTS. See ATTACHMENT, 1. BANKRUPTCY, 1, 2, 6. JUDGMENT, 8. MECHANICS' LIENS, 1.

1. **District: JURISDICTION: CLAIMS AGAINST ESTATES.** The district courts of this state have no original jurisdiction to allow claims against the estate of a decedent or to order the payment of such claims out of funds in the hands of the administrator. *Craig v. Anderson*..... 638
2. **Judicial Notice of Their Own Records and Signatures.** Courts will take judicial notice of the genuineness of their own records and the signatures of their own officers. *Zug v. Forgan* 149

COVENANTS.

1. **Against Taxation: EVIDENCE SUFFICIENT.** Evidence examined and held to support the finding and decree. *Druse v. Davey* 16
2. **Incumbrances: RUNNING WITH LAND.** A covenant in a deed of conveyance "that they are free from all incumbrances" does not run with the land so as to invest a remote grantee thereof with a right of action against the covenantor. *Watters v. Bagley* 706

COVERTURE. See BILLS AND NOTES, 4.

CREDITORS' SUIT.

1. **Attachment Suit Merged in Attachment Judgment.** As between plaintiff and the debtor's estate all matters litigated in the attachment suit must be deemed merged in the judgment and order of sale of the attached property. *First Nat. Bank of Madison v. Tompkins*..... 328
2. **Evidence Sufficient.** Evidence examined and held to support the judgment of the district court. *First Nat. Bank of Plattsburgh v. Peterson* 602
3. **Fraudulent Conveyances: BANKRUPTCY.** The facts herein are the same as in the case of *Hood v. The Blair State Bank*, ante, page 432, and said case is approved and followed. *Hood v. Blair State Bank*..... 447
4. ———: **AS AGAINST ATTACHMENT JUDGMENT: EVIDENCE SUFFICIENT.** Evidence examined, and held to sustain trial court's finding that the deeds of the attached property, made

CREDITORS' SUIT—Continued.

- by the debtor in his lifetime, were fraudulent as against plaintiff's attachment and judgment. *First Nat. Bank of Madison v. Tompkins*..... 328
5. **Indebtedness Subsequent to Voluntary Deed.** A deed of real estate can not be avoided on the sole ground that it was voluntary by a creditor, to whom no indebtedness was incurred until after the conveyance. *State Bank of Pender v. Frey*..... 83
6. **Insolvency: JURISDICTION: ATTACHMENT AGAINST DEBTOR, JUDGMENT AGAINST HIS EXECUTRIX.** Where a creditor has obtained an attachment lien in debtor's lifetime, and subsequently judgment and order of sale of attached real estate is entered against the debtor's executrix, jurisdiction to clear the title of the attached lands of the debtor's fraudulent deeds, does not depend upon insolvency of the debtor's estate. *First Nat. Bank of Madison v. Tompkins*..... 328
7. **Judgment: AGAINST CESTUI QUE TRUST: INSOLVENCY.** In an action to subject real estate, the title to which is held in trust, to the payment of a judgment against the *cestui que trust*, it is immaterial whether the *cestui que trust* was insolvent, or indebted to the judgment creditor, when the trust was created. *Burke v. Tewksbury*..... 739
8. **Pleading: INTENT TO DEFRAUD.** In an action brought to set aside a conveyance of land and subject the same to the payment of the plaintiff's judgment, the petition sufficiently states a cause of action if it alleges that the conveyance was made for the purpose and with the intent to defraud creditors. *McIntyre v. Malone*..... 159
9. **Recorded Conveyances: CREDITORS PUT UPON INQUIRY.** Creditors are chargeable, *prima facie*, with constructive knowledge of conveyances, by parties in possession, and in the absence of any good reason to the contrary, either pleaded or proved, are put upon inquiry as to their consideration. *State Bank of Pender v. Frey*..... 83
10. ———: **NOTICE.** Where parties are in actual possession and personal control of the lands and are farming them in connection with their home premises, and conveyances are promptly recorded with no concealment of the circumstances, the records are constructive notice of the deeds' existence. *Idem*.
11. **Right of Trustee in Bankruptcy to Maintain if Insolvency Proceedings Pending.** Where it is shown in the petition of a trustee that insolvency proceedings are pending under the state insolvency law, providing for an assignment for the benefit of creditors, his action to set aside alleged fraudu-

CREDITORS' SUIT—Concluded.

lent conveyances and a decree of the state court foreclosing them, can not be maintained. *Hood v. Blair State Bank*.... 432

12. **Trustee in Bankruptcy May Maintain: FRAUDULENT CONVEYANCES: NECESSITY OF JUDGMENT.** A trustee in bankruptcy, acting for the creditors of the bankrupt, may maintain an action in the nature of a creditors' bill to set aside a fraudulent conveyance without reducing the claims of the creditors to judgment. In all other things he possesses only such rights and powers as they can exercise for themselves. *Idem*.

13. **Trusts: EVIDENCE SUFFICIENT.** Evidence examined, and held sufficient to sustain the decree of the district court. *Burke v. Tewksbury* 739

CROPS. See LANDLORD AND TENANT, 2.

1. **Mortgages: APPEAL: RECEIVER: TENANT ENTITLED TO CROPS.** Where an appeal is taken from an order of confirmation and a supersedeas granted, and a receiver of the mortgaged premises is appointed pending such appeal, a tenant of the mortgagor is entitled to the crops, growing on the mortgaged premises at the time of such appointment, as against such receiver, whether such crops are mature or not. *Cassell v. Ashley* 787
2. **Right to: EXECUTION: SALES.** A purchaser of land at execution sale is entitled to all crops planted thereon after confirmation. *Jaques v. Davies*..... 752

DAMAGES. See CHATTEL MORTGAGES, 3. CORPORATIONS, 2. GAMING, 1. INJUNCTIONS, 4. MUNICIPAL CORPORATIONS, 5. NUISANCE. RAILROADS, 6. TELEGRAPHS AND TELEPHONES, 1-4. WATERS AND WATER COURSES, 3, 4.

1. **Measure of: DISEASE AMONG SHEEP: INSTRUCTIONS.** Instruction relating to the measure of damages examined and approved. *Burnham v. Meredith*..... 287
2. **Negligence: INSTRUCTIONS CONFLICTING.** Instructions examined, and held to be conflicting and consequently erroneous and prejudicial. *Raynor v. City of Wymore*..... 51

DECREE. See APPEAL AND ERROR, 9.**DEEDS. See LIMITATION OF ACTIONS, 5, 6.****DEFICIENCY. See MORTGAGES, 9, 31-36, 68.****DEPOSITIONS.**

1. **Certificate of Notary: OBJECTIONS.** It is not a sufficient objection to the reading of a deposition in evidence that the officer before whom it was taken does not certify that the witnesses were sworn as well after as before testifying. *Donovan v. Hibbler* 652

DEPOSITIONS—Concluded.

2. **Term Time of Court, Taken During.** In the absence of a statute or standing court rule forbidding the taking of depositions during a term time of the court in which the cause is pending, the fact that they are so taken is not ground for suppressing them. *Idem.*

DESCRIPTION. See CHATTEL MORTGAGES, 1. MORTGAGES, 15, 16, 37. PARTIES, 4.

DIRECTING VERDICT. See APPEAL AND ERROR, 2. REPLEVIN, 1. TRIAL, 3-5, 7, 9.

DISCLAIMER. See MORTGAGES, 38.

DISCRETION. See ATTACHMENT, 3. COSTS, 2. EVIDENCE, 15. MANDAMUS, 1. MORTGAGES, 63. PLEADING, 2.

DISMISSAL. See JUSTICES OF THE PEACE. MORTGAGES, 39.

DISTRIBUTION. See PLEADING, 4.

DIVORCE.

1. **Action to Set Aside: EVIDENCE SUFFICIENT.** Evidence examined, and *held* sufficient to sustain the judgment of the trial court. *Humphrey v. Humphrey*..... 467
2. **Cruelty: CHARACTER AND SITUATION OF PARTIES: EVIDENCE.** Where the testimony in a suit for divorce tends to show that each party was addicted to the use of profane language about the home and in addressing the other, the court is justified in refusing to grant a divorce to either on that ground. *Schuster v. Schuster*..... 610
3. ———: ———: While the habitual use of rough or vile language may amount to cause of divorce, much must depend upon the character of the parties, their situation in life, and the degree of cultivation and refinement they exhibit. *Idem.*
4. ———: **PROVOCATION: QUESTION FOR TRIAL COURT.** Whether the alleged improper language of the husband was provoked by indiscreet actions of the wife, unless the language used was entirely disproportionate to the occasion, is a question for the trial court. *Idem.*

EASEMENTS.

Right of Way: WITNESSES: COMPETENCY. *Union P. R. Co. v. Stanwood* 123

ELECTION. See BANKS AND BANKING, 4, 5. PLEADING, 4.

EMINENT DOMAIN.

1. **Award: APPEAL BY MORTGAGEE.** A mortgagee who is a party to condemnation proceedings for right of way over

EMINENT DOMAIN—Concluded.

premises has a right of appeal from an award of damages for the taking of such premises independently of the owner of the fee. *Omaha Bridge & Terminal R. Co. v. Reed*..... 793

2. ———: ———: WAIVER. Such right of appeal on behalf of a mortgagee is not lost nor suspended by the filing of a claim for payment of the mortgage against the estate of the mortgagor. *Idem*.

3. ———: EVIDENCE SUFFICIENT. EVIDENCE in this case held sufficient to sustain an award of damages for \$5,059. *Idem*.

EQUALIZATION. See TAXATION, 9.**EQUITY. See APPEAL AND ERROR, 9-12, 34. INJUNCTION, 5.**

1. Action Based on Decree in: WHEN MAY NOT BE BROUGHT: PARTIES. One can not maintain an action based solely on a decree of the district court, in a suit in equity to which he was not a party, and which decree had been superseded by an appeal to the supreme court at the time his action was commenced, where such decree was not affirmed but was reversed and the suit in which it was rendered was dismissed for want of equity. *Riley Bros. Co. v. Melia*..... 666
2. Debtor and Creditor: CONVEYANCE BY DEBTOR: OBJECTION BY CREDITOR. A creditor has no standing in a court of equity to question a conveyance by his debtor which does not impair the security of his debt or hinder or delay him in the collection thereof. *Anthes v. Schroeder*..... 604
3. Sufficiency of Return as Evidence: EXECUTION. Return of the sheriff of *nulla bona* to an execution issued upon a judgment at law received in evidence, held, sufficient, under the provisions of section 851 of the Code of Civil Procedure, to authorize the court to proceed in the equity cause. *Zug v. Forgan* 149
4. When May Not Be Invoked. Equity will not aid avarice in purloining property. *Anthes v. Schroeder*..... 604

ESTOPPEL. See APPEAL AND ERROR, 32, 34. CORPORATIONS, 6. MORTGAGES, 1, 14, 38. MUNICIPAL CORPORATIONS, 7.

1. Conduct. An estoppel by conduct never extends beyond the reasonable inferences to be drawn from such conduct. *Hall v. Moore*..... 574
2. When Operates. The silence of one party does not operate as an estoppel in favor of another, unless it appear that such other party has been induced thereby to change his position to his injury. *Columbus State Bank v. Carrig*..... 593

EVIDENCE.

Conflicting. See **APPEAL AND ERROR**, 13-19, 51. **LANDLORD AND TENANT**, 3. **PRINCIPAL AND AGENT**, 1. **TRIAL**, 6.

In General. See **ACCOUNT STATED**. **ADVERSE POSSESSION**, 4. **APPEAL AND ERROR**, 10, 20, 32, 46, 50. **ATTACHMENT**, 3. **BASTARDY**, 1. **BENEFICIAL ASSOCIATIONS**, 4. **BILLS AND NOTES**, 2. **CONTRACTS**, 2, 6, 12. **EXCEPTIONS**, **BILL OF**, 3. **HIGHWAYS**, 1. **JUDGMENT**, 3, 6. **MALICIOUS PROSECUTION**, 1, 2. **NOTARIES**. **PARTITION**, 1. **PLEADING**, 6, 7. **PRINCIPAL AND AGENT**, 4. **STREET RAILROADS**, 2, 3. **TRIALS**, 7-10, 21, 23. **WATERS AND WATER COURSES**, 3. **WITNESSES**, 4-6.

Insufficient. See **BENEFICIAL ASSOCIATIONS**, 5. **BILLS AND NOTES**, 3. **GAMING**, 3. **INJUNCTION**, 1. **INSURANCE**, 1. **LANDLORD AND TENANT**, 4. **MORTGAGES**, 41. **MUNICIPAL CORPORATIONS**, 4. **QUIETING TITLE**, 4, 6. **TAXATION**, 2. **TRIAL**, 4. **WILLS**, 3.

Sufficient. See **ACCORD AND SATISFACTION**, 1. **ADVERSE POSSESSION**, 1. **APPEAL AND ERROR**, 21-24. **ATTACHMENT**, 4. **BASTARDY**, 2. **BILLS AND NOTES**, 5-7, 11. **BOUNDARIES**, 1. **CHATTEL MORTGAGES**, 4. **CONTRACTS**, 1, 4. **CONVERSION**, 2. **COVENANTS**, 1. **CREDITORS' SUIT**, 2, 4, 13. **DIVORCE**, 1. **EMINENT DOMAIN**, 3. **FRAUDULENT CONVEYANCES**, 1, 2. **GAMING**, 4. **MORTGAGES**, 2, 40, 42, 46, 70. **PRINCIPAL AND AGENT**, 3, 5, 6. **SALES**, 2. **WATERS AND WATER COURSES**, 4. **WILLS**, 4. **WORK AND LABOR**.

1. **Bills and Notes: RATE OF DISCOUNT WHERE NOTE IS PURCHASED: RATE AT OTHER PLACES.** When the usual rate of discount is shown at the place where a note is purchased, as bearing upon the question of good faith in such purchase, it is proper to exclude evidence offered as to rates of discount in other places, although in the same county. *Canon v. Farmers' Bank of Cook*..... 348

2. **Expert Testimony: MEDICAL EXPERT.** The testimony of a medical expert is not objectionable as being conjectural and speculative, because it gives the opinion of such expert as to the probability of a physician's accomplishing a certain result in a given time if he had been in attendance upon a woman in confinement. *Western Union Telegraph Co. v. Church* 22

3. **Failure to Disclose Ground of Objection: APPEAL AND ERROR.** It is the duty of one objecting to a question asked a witness to state the grounds upon which he relies for the exclusion of the proffered testimony, so that the trial court may rule with such criticism in mind; and an objection based upon grounds not disclosed at the time such objection is made will be disregarded on appeal. *Idem*.

4. **Identification of Letters:** The contents of letters and tele-

EVIDENCE—Continued.

- grams, which pass between parties in the course of a business transaction, not otherwise identified than by a witness who has a direct legal interest in the result of the suit, are not competent evidence as against the personal representative of a deceased person. *Harte v. Reichenberg*..... 820
5. **Immaterial to Issues.** Certain evidence tendered by plaintiff held properly excluded as not material under the issues of the case. *Martin v. Connell*..... 240
6. **Instruction Unduly Emphasizing Evidence.** An instruction which contains a correct proposition of law, but in which a particular portion of the evidence is pointed out, the attention of the jury is directed to it, and its effect is unduly emphasized, should not be given. *Martens v. Pittock*, 770
7. **Insufficient: VERDICT RIGHT: FALSE REPRESENTATIONS: ERRORS DISREGARDED.** Evidence examined, and its substance quoted. Held, That it was not sufficient to constitute a defense; that the verdict was clearly right and the only one warranted by the evidence. Therefore the errors, if any intervened during the trial, should be disregarded. *United States School Furniture Co. v. School District*, 56 Neb., 645, 77 N. W. Rep., 62. *Canon v. Farmers' Bank of Cook*.... 348
8. **Medical Expert: HYPOTHETICAL QUESTION: TIME OF OBJECTING.** An objection to the form of an hypothetical question asked of a medical expert on the ground that it permitted the witness to consider the subjective conditions in giving his opinion should be made at the trial or it will be unavailing. *Western Union Telegraph Co. v. Church*..... 22
9. **Offer to Prove Fact Not Connected With Transaction in Question.** An offer to prove that defendant's cashier, when he purchased the note in suit, knew of other transactions of the kind in question generally, in Lincoln in the years of 1895 and 1896, and that Woods Bros., of said place, had tried to hire him as a capper, without offering to in any manner connect such proof with the transaction in question, was properly excluded as too remote to be of any assistance to the jury. *Canon v. Farmers' Bank of Cook*..... 348
10. **Parol, to Vary a Written Receipt: CONTRACTS.** Where neither fraud nor mistake is alleged, parol evidence to contradict or vary a written receipt must be clear and unequivocal. *Rouss v. Goldgraber* 424
11. **Presumption as to Law of Foreign State.** In the absence of any proof on the subject this court will presume that the laws of the state of Pennsylvania are the same as the laws of this state. *Angle v. Manchester*..... 252
12. **Remoteness of Fact: RULE FOR DETERMINING.** Whether a

EVIDENCE—Concluded.

- particular fact sought to be proved is too remote is a question that can not be determined according to any fixed and unvarying rule. The circumstances of the particular case and the relation of the fact in question to other evidence must be taken into account. *Gandy v. Estate of Bissell*.... 47
13. **Tendency to Establish Fact in Controversy: ADMISSIBILITY.** Evidence is not to be rejected, necessarily, because it does not bear directly upon the issue. If it forms a link in the chain of evidence or tends reasonably to establish the fact in controversy by strengthening the probabilities on one side or weakening those upon the other, it should be received. *Idem*.
14. **Testimony at Former Trial: WEIGHT: INSTRUCTIONS.** Not error to refuse to tell the jury that statements read from record of former trial were to be given same weight as if made by witness actually present. *Crane Company v. Columbus State Bank*..... 339
15. **Witness Unable to Attend Trial: EVIDENCE TAKEN AT HOME OF WITNESS: DISCRETION.** The action of the trial judge in going to the home of a witness who was physically unable to attend court and permitting her testimony to be taken in his presence there, *held*, not an abuse of judicial discretion. *Humphrey v. Humphrey*..... 467
- EXCEPTIONS, BILL OF.** See MORTGAGES, 11. MANDAMUS, 3.
1. **Affidavits for Continuance.** Affidavits for continuance must be embodied in the bill of exceptions if the right to a continuance is to be examined on its merits upon review. *Kinney v. Bittinger*..... 817
2. **Affidavits Omitted.** Affidavits used in the hearing of a question in the trial court will not be considered in this court unless embodied in a bill of exceptions properly settled and allowed. *Phenix Mutual Life Ins. Co. v. Williams* 79
3. **Evidence in Attachment Wanting: PRESUMPTIONS.** Where the evidence taken in the county court on a motion to dissolve an attachment is not preserved by a bill of exceptions, and is not before the court of review, it will be presumed that the evidence was sufficient to sustain the judgment and order of the lower court. *Dittman Boot and Shoe Co. v. Graff*..... 165

EXECUTIONS. See CROPS, 2. EQUITY, 3.**EXECUTORS AND ADMINISTRATORS.**

- Contracts: BINDING EFFECT.** The administrator of an estate can not make contracts in his representative capacity which will bind the estate. *Craig v. Anderson*..... 638

EXPLOSIVES. See CORPORATIONS, 1, 2. NUISANCE.

1. **Negligence:** CORPORATIONS. It is negligence for a corporation giving a fireworks exhibition on its own grounds, to use dynamite bombs and other explosives which are so improperly prepared and manufactured that they will not explode while in the air and fire or propel them into the air at such an angle that they will fall outside of its grounds upon public or private premises and permit them to remain where children and persons unacquainted with their dangerous nature can pick them up, handle them and thus cause them to explode to their injury and damage. *Bianki v. Greater American Exposition* 656
2. ———: ———: ACTS OF AGENT. A corporation which employs an agent to give such an exhibition will be held liable for the negligent acts of its agent, unless relieved from such liability because the person so employed is an independent contractor. *Idem.*
3. ———: NUISANCE. In giving a fireworks exhibition, it is not unlawful or a nuisance *per se* to shoot off sky-rockets, bombs and other explosives in a careful and suitable manner upon one's own premises. *Idem.*

FALSE REPRESENTATIONS. See FRAUD, 1.

FEES. See ATTORNEY AND CLIENT, 1, 2. COSTS, 1. FRAUD, STATUTE OF, 1. TAXATION, 4.

FINAL ORDER. See APPEAL AND ERROR, 25, 47.

FINDINGS. See APPEAL AND ERROR, 22, 24, 26, 28. ATTACHMENT, 2. TRIAL, 12.

FIXTURES. See LANDLORD AND TENANT, 3.

FORCIBLE ENTRY AND DETAINER.

1. **Appeal and Error:** STATUTES. No appeal lay to the district court from the judgment of the county court in proceedings in forcible entry and detainer prior to the enactment of chapter 85, Laws of 1901. *Armstrong v. Mayer*, 60 Neb., 423, followed. *Moore v. Heltzel*..... 10
2. **Judgment:** SUFFICIENT. Judgment in forcible entry and detainer is sufficient if it is for restitution "of the premises described in the complaint" where the complaint is for a specifically described portion of land. *Locke v. Skow*..... 299
3. **Pleading:** COMPLAINT IN LANGUAGE OF STATUTE. Complaint in forcible entry and detainer is sufficient if substantially in the words of the statute. *Blachford v. Frenzer*, 44 Neb., 829. *Idem.*

FORFEITURE. See BENEFICIAL ASSOCIATIONS, 1.

- FRAUD.** See **CONTRACTS**, 12. **LIMITATION OF ACTIONS**, 9. **MORTGAGES**, 17, 20, 26, 43. **TRIAL**, 8. **VENDOR AND PURCHASER**, 1.
1. **False Representations:** **INSTRUCTIONS APPROVED.** Instructions Nos. 3 and 4 examined, substance stated, and *held* that they correctly state the law relating to false and fraudulent representations. *Canon v. Farmers' Bank of Cook* 348
 2. **Promise Not Performed:** **INSTRUCTIONS.** Fraud can not be predicated on a promise not performed. To be available there must be a false assertion in regard to some existing matter, which is material, and by which a party is induced to part with his money or property. *Perkins v. Lougee*, 6 Neb., 220. *Held*, That an instruction to that effect was properly given. *Idem*.

FRAUDS, STATUTE OF.

1. **Agreement to Pay Attorneys' Fees.** In this case the agreement to pay attorneys' fees is an original and independent contract and is not within the statute of frauds as being a promise to answer for the debt of another. *Weilage v. Abbott* 157
2. **Proof of Transfer of Land:** **RECOVERY OF CONSIDERATION.** The statute of frauds furnishes no objection to proof of a completed transfer of an interest in land, where the only question is the recovery of its consideration. *Skow v. Locke*, 176
3. **Waiver:** **BROKERS.** Whether a defendant who has not pleaded the statute and permits evidence of an oral agreement employing an agent to sell land to be introduced without objection does not thereby waive the provisions of section 74, chapter 73, Compiled Statutes, *quære*... *Dillon v. Watson* 530

FRAUDULENT CONVEYANCES. See **CREDITORS' SUIT**, 3, 4, 12.

1. **Evidence Sufficient.** Evidence examined, and *held* sufficient to support the judgment of the district court that a conveyance was not made with the intent to defraud creditors. *McNerney v. Hubbard* 104
2. ———. Evidence *held* sufficient to uphold the finding of the trial court, and former judgment of affirmance adhered to. *Idem* 108
3. **Incorporation Fraudulent:** **BONA FIDES.** The question of whether or not the incorporation of Hubbard Bros. Company was fraudulent, *held*, to depend upon whether or not the \$5,000 indebtedness of Hubbard Bros., a partnership, to Enoch Hubbard, whose payment was the main object of incorporating, was *bona fide*. *Idem*.
4. **Participation in Fraud by Creditor.** A sale made by an in-

FRAUDULENT CONVEYANCES—Concluded.

- solvent deb'tor to one of his creditors in payment of a pre-existing debt, will not be held void merely because the creditor had notice of an intent upon the part of the debtor to hinder, delay or defraud his creditors, provided the conveyance does not cover more property than is reasonably necessary to discharge the indebtedness existing. In order to avoid such a sale it is not sufficient to show that the creditor merely desired to secure his own debt, it must be shown that he participated in the fraudulent intent of his grantor. *Grainger v. Erwin*..... 204
5. **Preferences: INSOLVENCY.** Where defendants admit that an assignment of their account against a bankrupt to a purchaser of his stock and business was with the understanding that it was to be used in payment therefor, and that they were to "carry" the purchaser on the account, if it be added that the defendants had notice of the bankrupt's insolvency, the transaction would amount to a preference and must be held to have been so intended. *Hackney v. Hargreaves Bros.* 676
6. **Transactions Between Relatives: BONA FIDES.** Transactions between relatives by reason of which strangers who have sold goods to some of such relatives will be deprived of payment therefor, will be scrutinized very closely and the good faith of the same must be clearly established. *Bartlett v. Cheesbrough*, 23 Neb., 767. *Knudson v. Parker*..... 481
7. **Vendee's Knowledge of Fraudulent Intent.** While the vendor and vendee must both unite in a fraudulent intent, in order to avoid a sale as to the creditors of the vendor, it is sufficient for that purpose to show the fraudulent intent on the part of the vendor and knowledge of that intent by the vendee, or of sufficient facts to put a person of ordinary prudence on inquiry. *Grainger v. Erwin*..... 204

GAMING.

1. **Board of Trade Transactions: CONVERSION BY BROKER: LIABILITY: MITIGATION OF DAMAGES.** In an action against a broker he should be charged with the amount of the trust fund actually received and converted by him, and he is entitled to credit, by way of mitigation of damages, for all of the money repaid by him which can be traced back into the hands of the owner thereof. *Mendel v. Boyd*..... 473
2. ———: **DRAFTS: DEFENDANT PUT UPON INQUIRY.** The drafts used in the deals complained of having been drawn to the order of the cashier of the bank which was defrauded, by himself or at his instance by the assistant cashier, were sufficient, of themselves, to put the defendant upon inquiry

GAMING—Concluded.

as to the nature and ownership of the funds used by them in the transactions. *Idem.*

3. ———: EVIDENCE INSUFFICIENT. Evidence examined, and held not sufficient to sustain the verdict. *Idem.*
4. ———: LEGALITY. Evidence examined and held to establish the fact that the transactions complained of were mere speculations on the rise and fall of the market price of grain on the board of trade, and were therefore illegal and void. *Idem.*
5. ———: LIABILITY OF BROKER. The broker in such board of trade transactions will be held liable to the true owner of the funds, even if he has no knowledge of the ownership thereof. *Central Stock and Grain Exchange v. Bendinger*, 109 Fed. Rep., 926. *Idem.*
6. ———: MONEY LOST BY BANK CASHIER: SUBROGATION. When a bank cashier is a defaulter to his bank for money used in gambling on the board of trade, and his sureties to the bank pay his shortage, they are subrogated to the rights of the bank against the broker with whom the money was lost. *Idem.*
7. ———: PAYMENT TO JOINT TORT-FEASOR: LIABILITY OF BROKER. Payment to the joint *tort-feasor* without tracing the money into the hands of its owner is no defense in an action against the broker to recover the money lost in such deals. *Idem.*

HIGHWAYS. See RAILROADS, 1-5.

1. Record: COUNTIES: EVIDENCE ON ERROR. All orders made and proceedings had by a county board in the establishment of a road are required to be recorded; hence, on error from an order establishing a road, such proceedings can be shown only by a duly certified transcript of the road-record and a properly settled bill of exceptions containing such matters considered by the board as were not to be recorded. *Brabham v. County of Custer*..... 801
2. ———: FINDING OF "PUBLIC GOOD." It is not necessary to enter upon the record an express finding that the public good requires the road to be opened. *Idem.*

HUSBAND AND WIFE. See BILLS AND NOTES, 4, 5. HOMESTEAD, 1, 2. MORTGAGES, 44. VENDOR AND PURCHASER, 5.

1. Husband and Wife: EXTENSION OF MORTGAGE: WHO MUST SIGN. The same rule (see following syllabus) governs with reference to an agreement for the extension of a mortgage given for such a consideration. *Irwin v. Gay*..... 153
2. ———: MORTGAGE FOR PURCHASE PRICE: WHO MUST SIGN.

HUSBAND AND WIFE—Concluded.

When a mortgage is given to secure part payment of the purchase price of a homestead to be established, it is unnecessary that such mortgage be signed and executed by both husband and wife; only the one taking the title need execute such mortgage. *Idem.*

3. **Mortgages: RECEIVER.** A receiver will not under ordinary circumstances be appointed to take possession of mortgaged premises pending an action to foreclose the mortgage when the mortgaged property is the homestead of the mortgagor. *Idem.*
4. ———: ———: **MORTGAGOR'S INTEREST: RECEIVER.** S. foreclosed a mortgage on 160 acres of land occupied by the mortgagor as his homestead. A deficiency existed and S. applied to the court for a receiver pending an appeal to this court taken by the mortgagor from an order confirming the sale. On the hearing it was shown that the value of the whole tract did not exceed \$2,000 above the incumbrance thereon; it was further shown, and the court found, that either of the four forty-acre tracts of which the farm consisted exceeded in value the sum of \$2,000. The court appointed a receiver for all but 45 acres of the tract upon which the orchard, dwelling house and other improvements were located. *Held*, That the mortgagor's interest in the whole tract being less than \$2,000 he was entitled to hold the same as a homestead and that the court erred in appointing a receiver for any part of the tract. *Sanford v. Anderson*..... 561
5. **Rights of Heirs Under the Statute.** The words "his or her heirs," as used in section 17 of chapter 36 of the Compiled Statutes of Nebraska, refer to the heirs of the decedent and not to those of the survivor. *Schuyler v. Hanna*, 31 Neb., 307, followed. *Fort v. Cook* 12

HYPOTHETICAL QUESTIONS. See EVIDENCE, 8.

IDENTIFICATION. See EVIDENCE, 4.

IMPEACHMENT. See WITNESSES, 6.

IMPROVEMENTS. See MORTGAGES, 45, 51. PARTITION, 2.

INCUMBRANCES. See COVENANTS, 2.

INJUNCTION. See APPEAL AND ERROR, 25. LIMITATION OF ACTIONS, 2. MUNICIPAL CORPORATIONS, 12. WATERS AND WATER COURSES, 2.

1. **Against Sale: EVIDENCE INSUFFICIENT.** Evidence examined, and *held* not to sustain the finding that the defendants were unable to comply with the terms of the decree. *Commercial State Bank of Crawford v. Ketcham*..... 839

INJUNCTION—Concluded.

2. **Allowed by County Judge: VALIDITY.** Where, in the absence of the district judge and of the judges of the supreme court, a petition for an injunction is presented to the county judge, and a temporary injunction allowed by him, and the petition and the order of the county judge forthwith filed in the district court, the injunction is not void on the ground that the order therefor was made before the action was commenced. *Idem.*
3. **Pleading Sufficient.** Pleadings examined, and held sufficient to support the judgment. *Helm v. Byfield* 387
4. **Trespass: ACTION FOR DAMAGES AT LAW.** In case of a mere trespass unless the threatened harm will be great or the loss therefrom irreparable, and such as can not be recompensed in damages by an action at law, an injunction will not be granted to prevent it. *Tigard v. Moffitt*, 13 Neb., 565, followed. *Leach v. Harbaugh*..... 346
5. ———: **INSOLVENCY: EQUITABLE RELIEF.** There being no proof that defendant was insolvent, the facts established do not present a case for equitable relief. *Idem.*

INSANITY. See MORTGAGES, 26, 46.

INSOLVENCY. See BANKRUPTCY, 5. CREDITORS' SUIT, 6, 7, 11. FRAUDULENT CONVEYANCES, 5. INJUNCTION, 5.

INSTRUCTIONS. See APPEAL AND ERROR, 8, 16, 27-31, 59. ARREST, 1, 2. BANKRUPTCY, 4. BASTARDY, 3. BOUNDARIES, 4. CONTRACTS, 10, 11. DAMAGES, 1, 2. EVIDENCE, 6, 14. FRAUD, 1, 2. MUNICIPAL CORPORATIONS, 5. PRINCIPAL AND AGENT, 7, 8. TRIAL, 1, 2, 5, 6, 13-25. WILLS, 3.

INSURANCE. See BENEFICIAL ASSOCIATIONS, 1-8.

1. **Evidence Insufficient.** The verdict and judgment of the district court being wholly unsupported by the evidence are reversed and a new trial granted. *Farmers Mutual Ins. Co. v. Tighe* 337
2. **Fraternal: APPLICATION AS A PART OF POLICY: PLEADING.** Where it is claimed that the application is a part of the contract of insurance in a fraternal company, such fact must appear from the language of the policy, application, constitution or by-laws of the company, or by apt averments in the pleadings of the party thus claiming that it is. *Supreme Lodge Sons & Daughters of Protection v. Underwood* 798
3. ———: **SUICIDE.** A certificate of membership, in favor of a person therein named as beneficiary, in a fraternal insurance company organized for the benefit of its members and beneficiaries, is not avoided by the suicide of the assured, in the absence of a provision in the contract of insurance to that effect. *Idem.*

- INTENT.** See ADVERSE POSSESSION, 4. CREDITORS' SUIT, 8. FRAUD-
ULENT CONVEYANCES, 7.
- INTEREST.** See MORTGAGES, 18, 47. TAXATION, 4. VENDOR AND
PURCHASER, 4.
- INTERPLEADER.** See SALES, 3.
- INTERVENTION.** See REPLEVIN, 2.
- IRRIGATION.** See BONDS. MUNICIPAL CORPORATIONS, 1. WATERS
AND WATER COURSES, 1.
- ISSUES.** See APPEAL AND ERROR, 32, 33. EVIDENCE, 5. PLEADING,
11. TRIAL, 15, 19, 23, 26.
- JUDGMENT.** See APPEAL AND ERROR, 34. ATTACHMENT, 2. BILLS
AND NOTES, 7, 8. CREDITORS' SUIT, 1, 4, 6, 7, 12. FORCIBLE
ENTRY AND DETAINER, 2. MORTGAGES, 26. REPLEVIN, 3, 4.
1. **Action on Foreign: DEFENSE: LACK OF AUTHORITY IN AT-
TORNEY TO APPEAR IN FIRST ACTION.** In an action on a
foreign judgment, rendered in proceedings in which there
was no service of process on the defendant, and no waiver
of such service, the defendant may show, as a complete
defense, that the attorney who entered an appearance for
him in such proceedings had no authority to do so. *National Exchange Bank v. Wiley*..... 716
 2. ———: **FAILURE IN PROOF OF VALIDITY: RECOVERY ON NOTE.**
Where, in an action on a foreign judgment plaintiff's peti-
tion contains but a single cause of action, and that on the
judgment only, and he fails to introduce sufficient evidence
to prove the validity of his judgment, he will not be per-
mitted to recover on the note on which the judgment is
alleged to have been rendered. *Angle v. Manchester*..... 253
 3. ———: **PLEADING AND PROOF OF FOREIGN LAW.** Where a
suit is instituted on a judgment of another state rendered
in a manner unknown to the jurisprudence of this state,
the existence of the laws of such other state which render
the judgment valid must be both alleged and proved. *Idem*.
 4. **Against City: CHARACTER OF: TAXATION TO PAY.** In de-
termining the power of a city to levy taxes to pay judg-
ments against the city, the judgments partake of the char-
acter of, and are governed by the same rules of limitation
as, the original claims upon which they are based. *State*
v. Royse 263
 5. **Against Partners: VACATION BY PARTNERSHIP.** Where a
judgment at law is made to run against the individuals
composing a partnership, a motion by the partnership to
vacate such judgment is properly overruled. *Kellogg & Co.*
v. Spargur 595

JUDGMENT—Continued.

6. **Evidence of Existence of: MEMORANDUM.** When the existence of a judgment of the district court is a material issue in a case, the existence of such judgment is not established by the memoranda thereof contained in the judgment docket. *City of Red Cloud v. Farmers & Merchants Banking Co.* 544, 547
7. **Excessive: LIMITATION OF ACTIONS.** Record examined and found that the court excluded from its judgment a note claimed to have been barred by the statute of limitations. *Held*, That the judgment was not for too large an amount. *Malone v. Garver* 710
8. **Inferior Court: JURISDICTIONAL STEPS TAKEN OMITTED FROM TRANSCRIPT.** Ordinarily, when a judgment or order of an inferior court is assailed on the ground of a want of jurisdiction, every fact essential to jurisdiction must affirmatively appear; but such rule has no application, when the transcript before the reviewing court shows on its face that the jurisdictional steps, actually taken, are omitted therefrom. *Bart v. Myers* 196
9. **In Foreign County: CHANGE OF VENUE: MECHANICS' LIEN.** A judgment rendered in a county other than that in which the cause was tried, unless there has been a change of venue to such county, is invalid. *Conover v. Wright*..... 211
10. **Irregularities Not Jurisdictional: COLLATERAL ATTACK.** Mere irregularities in a judgment or order, which are not jurisdictional, do not render it subject to collateral attack. *Toogood v. Russell* 189
11. **Parties: JOINT: OMISSION OF ONE: VALIDITY.** A judgment against one of two parties jointly liable is not void for not including the other. At most it would only be voidable. *School District v. Kountze Bros.*..... 690
12. ———: **REVIVOR AS TO: JURISDICTION.** Where a judgment in form runs against two parties but there was no jurisdiction of one of them, and the latter was not in fact a party to the action, or to the judgment, revivor proceedings need run and are maintainable against only the party as to whom there was jurisdiction. *Idem.*
13. **Res Judicata: EXTENT OF THE RULE.** A judgment in a former suit will be a bar in a second action between the same parties and their privies involving the same subject-matters, as to everything which the record shows was within the scope of the issues litigated in the former action. *Battle Creek Valley Bank v. Collins*..... 38
14. ———: **ISSUES, RULE AS TO.** A judgment in a former suit will not be a bar to the prosecution of an action unless the

JUDGMENT—Concluded.

questions involved were within the issues litigated in such former suit. *Battle Creek Valley Bank v. Collins*, ante, page 38, 90 N. W. Rep., 921. *Malone v. Garver*..... 710

15. **Revivor by Assignee.** An assignee of a judgment may maintain revivor proceedings upon it in his own name. *School District v. Kountze Bros.* 690
16. **Tort-Feasor, Against: SETTLEMENT WITH THIRD PERSON.** A judgment against a tort-feasor is not satisfied by a settlement with a third person, in no way a joint wrong-doer with the judgment debtor, and not shown to have been liable. *Iddings v. Citizens' State Bank*..... 750

JUDICIAL NOTICE. See COURTS, 2.**JUDICIAL SALES.** See MORTGAGES.

1. **"Prior Lien" in Certificate of Liens: TAX LIEN ALWAYS PRIOR.** By law, taxes are made a first lien upon the real estate against which they are levied and assessed. Such lien is superior and prior to all others, and it is not necessary for the county treasurer in his certificate of liens, on judicial sale, to insert the words "prior liens." *Campbell v. Gawlewicz* 321
2. **Probate: APPLICATION TO SELL: JURISDICTION: COLLATERAL ATTACK.** Setting the day of hearing on an administratrix's application for a license to sell real estate at a date four days short of the required six weeks, is an irregularity only and does not prevent jurisdiction attaching to order the sale nor authorize a collateral attack on the sale and proceedings. *Haight v. Hayes* 587
3. **——: COLLATERAL ATTACK: FILING CLAIMS.** Jurisdiction having attached, the fact that no claims were ever filed or allowed against the decedent's estate cannot be advanced in a collateral proceeding to show the sale was void. *Idem.*
4. **Purchase by Plaintiff: PAYMENT OF MONEY.** Where, at a judicial sale the land is purchased by the plaintiff, mentioned in the decree, it is not necessary that the sum bid should be actually paid in money to the officer conducting the sale. *Campbell v. Gawlewicz*..... 321
5. **Return: AMENDMENT.** The return of the sheriff to an order of sale showed that the land was sold to the plaintiff, but failed to state that it was sold to the plaintiff as executor, etc. This failure was corrected by an amended return, held to constitute no grounds for objection to the confirmation of the sale. *Idem.*

JURISDICTION. See APPEAL AND ERROR, 35, 36. ATTACHMENT, 6. COURTS, 1. CREDITORS' SUIT, 6. JUDICIAL SALES, 2, 3. JUDGMENT, 8, 10, 12. MONEY RECEIVED, 1. MORTGAGES, 33, 39.

JUSTICES OF THE PEACE. See **APPEAL AND ERROR**, 36. **MONEY RECEIVED**, 1.

Appeal and Error: DISMISSAL OF APPEAL. A party appealing from a judgment of a justice of the peace to the district court may dismiss his appeal, without the consent of the appellee, at any time before the cause is submitted to the court, or jury. *Eden Musee Company v. Yohe*, 37 Neb., 452, approved and followed. *Dobry v. Northern Milling Co.*.... 67

LACHES. See **LIMITATION OF ACTIONS**, 3.

LANDLORD AND TENANT.

1. **Assumpsit for Use and Occupation.** Assumpsit for use and occupation is founded upon a contract creating a tenancy, and will only lie where the relation of landlord and tenant exists. *Janouch v. Pence*..... 867
2. **Crops: RELATIONSHIP: CREATION OF.** The mere right to enter upon land and remove crops therefrom is not sufficient to create the relation of landlord and tenant between the person holding such right and the owner of the premises. *Idem.*
3. **Fixtures: EVIDENCE CONFLICTING.** The question of the character of a steam heating plant, whether a permanent fixture or personal property which may be removed by a tenant during his term, is one of mixed law and fact, and the finding of the court upon that question, when based on fairly conflicting evidence, will not be disturbed. *President and Directors of Ins. Co. of North America v. Buckstaff*..... 632
4. **Relationship: EVIDENCE INSUFFICIENT.** Evidence examined, and found not sufficient to create the relation of landlord and tenant by implication. *Janouch v. Pence*..... 867
5. **Rent: ACTION TO RECOVER.** In order to maintain an action to recover for rent due, the relation of landlord and tenant must have existed between the parties, either by express agreement or by implication. *Idem.*
6. ———: **PRESUMPTIONS: TRESPASSER.** Although the law will generally imply a contract to pay a compensation for the use and occupation of any premises, yet the possession of a mere trespasser will not sustain the action; and a trespasser cannot be converted into a tenant without his consent. *Idem.*

LAW OF THE CASE. See **APPEAL AND ERROR**, 37. **BOUNDARIES**, 3.

LIENS. See **MORTGAGES**, 4, 5. **TAXATION**, 6. **TRUSTS**, 2.

LIMITATION OF ACTIONS. See **ADVERSE POSSESSION**, 1, 2. **JUDGMENT**, 7. **MORTGAGES**, 9, 69. **TAXATION**, 3.

1. **Appeal Bonds: STATUTES.** An action on an appeal bond is governed exclusively by section 14 of the Code and not barred until after ten years. *Crum v. Johnson*..... 826

LIMITATION OF ACTIONS—Concluded.

2. **Enjoining Judgment: TIME DEDUCTED.** When the collection of a judgment is enjoined, the time during which the injunction is operative will be deducted from the statutory period of limitation in determining whether or not the judgment is dormant. *State v. Royse*..... 262
3. **Laches: ACTION BROUGHT WITHIN TIME.** Laches cannot usually be charged against a party for failing to bring an action to enforce an equitable claim if he acts within the time allowed by the statute of limitations for commencing a corresponding action at law. *Michigan Trust Co. v. City of Red Cloud*..... 722
4. **Mortgage Foreclosure Begun Before Note Barred: TOLL OF STATUTE.** The institution of a suit of foreclosure on a mortgage before the note evidencing the indebtedness is barred by the statute, tolls the statute on the note from the time of the commencement of the foreclosure action. *Harris v. Nye & Schneider Co.*..... 169
5. **Recording Deed: LACK OF KNOWLEDGE.** In an action brought more than four years after the recording of a conveyance, to set aside for fraud, the plaintiff must show himself entitled to additional time because of lack of knowledge by both pleading and proof. *State Bank of Pender v. Frey*.. 83
6. ———: **WHEN BEGINS TO RUN.** The recording of a deed "when accompanied with circumstances sufficient to put a person of ordinary intelligence and prudence upon inquiry, which, if pursued, would lead to a discovery of the fraud," causes the statute of limitations to begin to run, "but not otherwise." *Forsyth v. Easterday*, 63 Neb., 887, 89 N. W. Rep., 407. *Idem.*
7. **Revivor: ACTIONS DISTINGUISHED FROM JUDGMENTS.** The limitation of one year for revivor of actions does not apply to proceedings to revive a dormant judgment. *School District v. Kountze Bros.*..... 690
8. **Statutes: SECTIONS EQUALLY APPLICABLE: CONSTRUCTION.** Where different sections of the statute of limitations are equally applicable, the one allowing the longer period governs. *Crum v. Johnson* 826
9. **When Begins to Run: DISCOVERY OF FRAUD.** The statute of limitations "begins to run against a creditor from the discovery of the fraudulent act on the part of his debtor, whether the creditor's claim has been reduced to a judgment or not." *Gillespie v. Cooper*, 36 Neb., 775. *State Bank of Pender v. Frey*..... 83

MALICE. See MALICIOUS PROSECUTION, 1.

MALICIOUS PROSECUTION.

1. **Attorney's Advice: MALICE: PROBABLE CAUSE: EVIDENCE.**
Miles v. Walker 804
2. **Evidence to Sustain Defense of Assault.** In an action for malicious prosecution, defendants alleged that plaintiff had been guilty of an assault with intent to kill, and on the trial sought to show by various witnesses that the condition of the person assaulted was serious and calculated to arouse apprehensions that he would die. Evidence introduced and received prior thereto amply showed that the plaintiff had acted in self defense. *Held*, That the exclusion of the proffered testimony was not prejudicial error. *Kyner v. Laubner* 370

MANDAMUS.

1. **Delay in Applying for: DENIAL OF, IN DISCRETION OF COURT.** Although delay in applying for a writ of mandamus is not an absolute bar, it may be sufficient ground in the discretion of the court, for denying the writ. *State v. Holmes*..... 183
2. **Settling Bill of Exceptions: DELAY IN PRESENTING BILL: PROOF OF FACTS.** The relator in mandamus proceedings to compel settlement of a bill of exceptions must show a clear right to have his proposed bill allowed. Hence where the trial judge upon hearing evidence has found that delay in not presenting the bill in the time fixed by law was due to laches and neglect of relator, the latter will be held to very clear proof that such finding was erroneous and that he is entitled to have the bill allowed notwithstanding. *Idem*.
3. **When Will Not Lie: TAXATION.** Mandamus will not lie to compel a city council to levy a tax in excess of its legal limitation. *State v. Royse*..... 262
4. ———: **TAXATION: WATER SUPPLY.** City authorities will not be required by mandamus to levy tax for water supply in excess of limit on such tax existing at time of contract. *State v. City of Wahoo*, 62 Neb., 40, followed and approved. *Idem*.

MECHANICS' LIENS. See APPEAL and ERROR, 38. JUDGMENTS, 9.

1. **Foreclosure: ADJOURNMENT OF COURT TO DAY CERTAIN BUT FAILURE TO CONVENE: DECREE SENT TO CLERK BY JUDGE.** In a suit for the foreclosure of a mechanic's lien, trial was had to the court, but before making findings of fact or pronouncing judgment, the district court adjourned to a certain date several days later, and the judge returned to his home in another county. Court did not reconvene on the day named, but on that date the clerk received by express from the judge memoranda of his findings and decree in the case, which he entered of record. At the next succeeding term an applica-

MECHANICS' LIENS—Concluded.

tion on the part of defendants in the case to correct the record to show that no decree was in fact entered was overruled. *Held, Error. Conover v. Wright*..... 211

2. ———: JUDGMENT AT CHAMBERS: VALIDITY. A judgment rendered by a district judge at chambers in a mechanic's lien foreclosure is null and void. *Idem*.

MEMORANDUM. See JUDGMENT, 6.

MENTAL CAPACITY. See WILLS, 3.

MISCONDUCT. See TRIAL, 8, 27.

MISTAKE. See CONTRACTS, 12. MORTGAGES, 49. PRINCIPAL and AGENT, 10.

MONEY RECEIVED.

1. Pleading: ANSWER AS TO RENT: JURISDICTION OF JUSTICE. The allegations of defendant, in an action simply for money had and received, that the money was rent for real estate adversely held, may state a defense, but does not deprive the justice of jurisdiction. *Phoenix Ins. Co. v. Hoyt*..... 94
2. Rents: ADVERSE POSSESSION. One who is in adverse possession of premises under a tax deed is not liable in an action for money had and received on account of rents received by him while so in possession to the holder of the legal title who has never asked or obtained possession. *Idem*.

MORTGAGES. See APPEAL AND ERROR, 39. CROPS, 1. HOMESTEAD, 1-4. LIMITATION OF ACTIONS, 4. NEWSPAPERS. RECEIVER, 1, 2.

1. Assumption of, in Deed: ESTOPPEL TO DENY. Where a grantee under a deed, by the terms of which he agrees to assume and pay a mortgage, for many years exercises ownership over the land conveyed, paying taxes, and interest on the mortgage, and joining in the execution of an agreement extending the time for the payment of the mortgage, he is estopped to deny that he assumed to pay the mortgage. *Cruzen v. Potlie*..... 453
2. Assumption of Payment: EVIDENCE SUFFICIENT. Evidence examined, and found to sustain findings and judgment of the trial court. *Idem*.
3. Debt of Third Party: FORECLOSURE: STATUTES, COMPLIANCE WITH. Where a mortgage is made to secure the debt of a third party it is a sufficient compliance with sections 850 and 851 of the Code of Civil Procedure to allege and show that judgment has been obtained against the party whose debt the mortgage was made to secure and that the sheriff has made a return to an execution issued on such judgment

MORTGAGES—Continued.

- "no property found." *Michigan Trust Co. v. City of Red Cloud* 722
4. **Executed Upon One-Half Interest: EFFECT ON OTHER HALF.** A mortgage executed upon a tract of land by the owner of an undivided one-half of it, creates no lien upon the undivided half owned by another without he joins in such conveyance. *Jolliffe v. Maxwell* 244
5. ———: **PARTITION: EXTENT OF LIEN.** When the property is partitioned, by a proper decree of the court, the mortgage attaches as a lien upon that portion set off to the mortgagor and his grantees, and the owner or owners of the other portion of the land take it divested of the mortgage lien. *Idem.*
6. **Foreclosure. Nebraska Loan & Trust Co. v. Winklemann.**.... 591
7. ———: "ACTION AT LAW." *Easton v. Lindegod.*..... 786
8. ———: ———: **EVIDENCE SUFFICIENT.** Evidence examined, and held to make a *prima facie* showing that no suit at law had been commenced on the notes secured by the mortgage in suit. *Vradenburg v. Johnson.*..... 326
9. ———: **APPEAL AND ERROR: DEFICIENCY: LIMITATION OF ACTIONS.** An appeal from a decree or order confirming a sale of real estate, in a foreclosure suit, suspends the running of the statute of limitations against an application for a deficiency judgment, and when a motion therefor is made immediately after the decree is affirmed in the appellate court, it will be held to have been made in time. *Brand v. Garneau* 871
10. ———: **APPRAISAL. Shoemaker v. Good.**..... 651
11. ———: ———: **BILL OF EXCEPTIONS QUASHED.** Where bill of exceptions is quashed, and sheriff's return of sale of mortgaged premises shows compliance with the law, no objections that appraisal was too low and was fraudulent, can be considered. *Janoska v. Pickard.*..... 289
12. ———: ———: **BY DEPUTY SHERIFF.** A deputy sheriff may act for and in the place of the sheriff in making an appraisal of real estate for the purpose of a judicial sale in the execution of a decree of court. *Union Trust Co. of New York v. King* 155
13. ———: ———: **CERTIFICATES OF LIENS: TIME OF FILING: PRESUMPTIONS.** Where the appraisement and certificates of liens are filed on the same day the notice of sale is first published it will be conclusively presumed, in the absence of a showing to the contrary, that they were filed before the notice of sale was published. *Foster v. McKinley-Lanning Loan & Trust Co.*..... 65

MORTGAGES—Continued.

14. ———: ———: DEDUCTION OF LIENS: ESTOPPEL TO COMPLAIN. Provisions regarding the deduction of liens by appraisers of lands about to be sold on execution or foreclosure are for the benefit of the plaintiff, and the defendant cannot complain of their non-observance. *Pierce v. Reed*..... 874

15. ———: ———: DESCRIPTION OF NAMES AS ET AL. An appraisal of the interests, in land about to be sold at judicial sale, of the parties to an action, against whom the decree operates, is not invalidated because the names of the owners of the equity of redemption are not stated other than by the designation "*et al.*" after the name of the principal defendant in the action. *Wells v. Frazier*, 64 Neb., 370, 89 N. W. Rep., 1033, followed. *Union Trust Co. of New York v. King* 155

16. ———: ———: DESCRIPTION OF PARTY. The addition of the phrase "*et al.*" after the names of the defendants whose interest is appraised, there being other defendants in the cause, though none claiming title to the property, will not vitiate the appraisement. *Pierce v. Reed*..... 874

17. ———: ———: FRAUD: VALUATION. The fact that four affidavits are filed asserting the valuation of the premises to be, in the opinion of the affiants, about one-third more than the valuation as found by the three appraisers, is not sufficient to show fraud on the part of the latter. *Idem*.

18. ———: ———: INTEREST: DEDUCTION ON PRIOR LIEN: PREJUDICE. A tract of land was incumbered by three mortgages, the first mortgage being for \$2,400. In a proceeding to foreclose the second mortgage a decree was entered finding the amount due thereon and establishing it as a second lien on the premises, subject only to the lien of the first mortgage for \$2,400, "with the accrued interest thereon." Prior to the sale the court directed the sheriff to include in the appraisement as a "prior incumbrance" the sum of \$1,138.67 as interest due on the \$2,400 mortgage, and the appraisement, as thus amended, showed the defendant's interest in the land to be \$628.11. The land sold for \$500. The defendant filed objections to the appraisement and to the confirmation of the sale, and made a showing that the interest due on the \$2,400 mortgage was \$1,100 only. *Held*, That conceding that the court had no authority to make the order which it did relating to the appraisement, yet, as the land sold for more than two-thirds of its appraised value, counting the interest on the first mortgage at \$1,100 only, the defendant was not prejudiced thereby. *First Nat. Bank of Sutton v. Ashley*. 18, 21

19. ———: ———: MADE BY SHERIFF: PRESUMPTIONS. All pre-

MORTGAGES—Continued.

- sumptions will be indulged in favor of the fairness of an appraisal made by a sheriff. *Union Trust Co. of New York v. King*..... 155
20. ———: ———: **OBJECTIONS AFTER SALE: FRAUD.** The appraisal of lands made for the purpose of a judicial sale cannot be attacked after such sale, except on the ground of fraud. *Insurance Co. of North America v. Ackerman*, 61 Neb., 312, 85 N. W. Rep., 287, approved and followed. *Omaha Loan & Trust Co. v. Borders*..... 3
Reed v. Hopkins 308
21. ———: ———: **OBJECTIONS: WHEN MADE.** All objections to the appraisal of property, to be available, must be made before the sale. *Bourke v. Sommers*..... 761
22. ———: ———: **QUALIFICATIONS OF APPRAISERS.** The appraisers need not be actually on the land at the time of making the appraisal, nor even in view thereof, provided they are familiar with the premises and acquainted with its value. *Pierce v. Reed*..... 874
23. ———: ———: **STATUTES.** *Woodward v. Kavan*..... 815
24. ———: ———: **TIME FOR MAKING OBJECTIONS.** Objections to a confirmation of sale on the ground that the appraisal was too low and that one of the appraisers was not a freeholder come too late to be availing if made after sale had. *Phoenix Mutual Life Ins. Co. v. Williams*..... 79
25. ———: ———: ———. Objections to the appraisal of real estate at a judicial sale are waived unless filed before sale. *Foster v. McKinley-Lanning Loan & Trust Co.*..... 65
26. ———: **CANCELLATION: INSANITY: FRAUD: FAILURE TO PLEAD DEFENSES: JUDGMENT REFUSED.** Where the mortgages sought to be foreclosed were canceled for mental incapacity of the mortgagor, on a general finding for defendants and where fraud in the inception of the notes was pleaded and their consideration denied, it is not error to refuse to enter judgment for the amount of the notes against the mortgagor's estate, although its administrator did not set up the defenses, and they appear only in the answers of his widow and heirs. *Farmers Bank v. Normand*..... 643
27. ———: **CONFIRMATION BY CONSENT: REDEMPTION AFTER TIME LIMITED.** Where sale of mortgaged premises under foreclosure has been confirmed, a setting aside of such confirmation, the entry of another by consent, the making and deposit with the clerk of the foreclosing court of master commissioner's deed based on the sale and last confirmation, and quitclaim deed of defendant, both running to plaintiff, with a stipulation of parties that deeds are to be held till

MORTGAGES—Continued.

May 1, following, control of property is meanwhile to be in a third party, who is to collect rents, pay taxes and insurance out of them, and the rest to plaintiff, and that if by May 1 the decree is paid, the deeds are to be destroyed and the rent meanwhile received by plaintiff paid to defendant, such facts do not show that the decree of foreclosure was set aside by mutual agreement, nor entitle defendant to redeem after May 1, and after delivery to plaintiff of the deeds in accordance with the stipulation. *Murray v. Mutual Benefit Life Ins. Co.*..... 861

28. ———: CONFIRMATION: OBJECTIONS: AFFIDAVITS: VALUE. Affidavits filed for the purpose of opposing the confirmation of a judicial sale of real estate, on the ground that the property was appraised too low, should show upon their face that the persons making them were qualified to give competent evidence as to the value of the real estate in question. *Bowman v. Bellows Falls Savings Institution*..... 583
29. ———: DECREE REGULAR. Decree of confirmation of sale examined and found regular. *Iowa Loan & Trust Co. v. Nehler*. 680
30. ———: DEDUCTING LIENS IN PRESENCE OF APPRAISERS. The fact that the officer has the certificates of prior liens in his possession at the time of the appraisal of real estate under an order of sale and calls the attention of the other two appraisers thereto, but does not deduct the amount thereof from the value of the land until after they separate, does not render the appraisal void. *Omaha Loan & Trust Co. v. Borders*..... 3
31. ———: DEFICIENCY: APPLICATION FOR: STATUTES. Under the provisions of section 848 of the Code of Civil Procedure, a motion and application for deficiency judgment is properly overruled when a foreclosure proceeding commenced prior thereto remains undisposed of. *Wolff v. Phelps*..... 511
32. ———: ———: DEFENSES CANNOT ANTEDATE DECREE. Where, in an action to foreclose a mortgage, the facts showing defendants' liability for a deficiency are set out in the petition, and a judgment against those personally liable for the debt is prayed for, and the court finds that the defendants are personally liable for the payment of any deficiency that may exist after the sale of the mortgaged premises, while such decree remains in force and unmodified, they cannot be permitted, when a judgment for a deficiency is sought, to set up the facts which existed when the original decree was obtained, to show that they are not liable. *Brand v. Garneau*..... 879
33. ———: ———: JURISDICTION: STATUTES. The jurisdiction

MORTGAGES—Continued.

- of the district court to render a deficiency judgment under the provisions of section 847 of the Code of Civil Procedure, as it stood before its repeal, did not depend upon the service of any notice other than the original summons. *Graves v. Macfarland*, 58 Neb., 802, approved and followed. *Idem*.
34. ———: ———: NOTICE TO CO-DEFENDANT. One against whom a deficiency judgment has been rendered cannot complain because a co-defendant was not served with notice. *Idem*.
35. ———: ———: REPEAL OF STATUTES. The court has jurisdiction to enter a personal deficiency judgment in actions of foreclosure which were pending prior to the repeal of sections 847 and 849 of the Code of Civil Procedure. *Wolff v. Phelps* 511
36. ———: ———: ———: ACTION BEGUN PRIOR. Where an action in foreclosure was instituted before the repeal of section 847 of the Code of Civil Procedure the court is authorized to enter a deficiency judgment against those personally liable on the debt, when a deficiency exists, notwithstanding the repeal of said section. *Patrick v. National Bank of Commerce*, 63 Neb., 200, 88 N. W. Rep., 183, followed. *Harris v. Nye & Schneider Co.* 169
37. ———: DESCRIPTION IN ORDER OF CONFIRMATION. Failure to specifically describe the property, or to name the purchaser, in the order of confirmation, not a fatal defect, where both are rendered certain by reference to the order of sale and the return. *Bowditch v. O'Linn* 202
38. ———: DISCLAIMER: OBJECTIONS TO DECREE: ESTOPPEL. A disclaimer of all interest in mortgaged property prevents any right to object to a foreclosure decree, which establishes no personal liability against the answering parties. *Bankers' Building & Loan Ass'n v. Thomas* 758
39. ———: DISMISSAL IN U. S. COURT FOR LACK OF JURISDICTION: SUBSEQUENT ACTION IN STATE COURT. Where a suit to foreclose a real estate mortgage is instituted in the circuit court of the United States and such cause is dismissed from said court for want of jurisdiction, the record of such dismissal is not a bar to a subsequent action between the same parties on the same mortgage in a state court having competent jurisdiction. *Irwin v. Gay* 153
40. ———: EVIDENCE OF "ACTION AT LAW": PRIMA FACIE PROOF. A *prima facie* showing that no proceedings have been had at law is sufficient to sustain a decree of foreclosure, in the absence of any evidence to the contrary. *Ure v. Bunn* 61

MORTGAGES—Continued.

41. ———: EVIDENCE INSUFFICIENT. Evidence examined, and found insufficient to sustain the findings and decree of the trial court. *Stewart v. Hoagland*..... 142
42. ———: EVIDENCE SUFFICIENT. Evidence examined, and held to sustain the findings and judgment of the trial court. *Omaha Loan & Trust Co. v. Luellen*..... 709
43. ———: EXAMINATION OF PROPERTY BY APPRAISERS: FRAUD. The fact that the appraisers did not examine the interior of a house upon property to be sold under decree of foreclosure does not prove of itself that they acted fraudulently in making the appraisalment. *Levy v. Hinz*..... 11
44. ———: HUSBAND AND WIFE. Held, No error to refuse to enter judgment, in a foreclosure suit, against her on notes signed by a married woman where there was evidence tending to show that she had no intention to bind her separate estate. *Farmers' Bank v. Normand*..... 643
45. ———: NOTICE: IMPROVEMENTS: PAYMENT OF JUNIOR MORTGAGE. In case of purchase with notice of junior lien, the proper course for the purchaser, if he desires the benefit of the improvements, is to pay off the subsequent mortgage of which he had notice at the time he acquired the property. *Jones v. Dutch* 673
46. ———: INSANITY OF MORTGAGOR: EVIDENCE SUFFICIENT. Evidence examined, and held to support a finding that the mortgagor was mentally incapable of contracting when plaintiff's alleged mortgages were executed. *Farmers Bank v. Normand*. 643
47. ———: INTEREST. Where both note and mortgage provide for ten per cent. per annum interest after maturity, such agreement fixes the interest to be allowed on foreclosure. *Yarnall v. Hupp*..... 1
48. ———: NO NEW QUESTIONS INVOLVED. *Ketchum v. Bly*.... 735
49. ———: NOTICE OF SALE: MISTAKE IN DATE. The fact that a notice of foreclosure sale bears a different date at its first insertion than in the successive issues of the paper containing it, will not vitiate the proceedings if the date of the sale itself and all other essential features of the notice are correctly stated throughout the several publications. *Pierce v. Reed*..... 374
50. ———: ———: STATEMENT OF AMOUNT OF DECREE. In a notice of sale of real estate under a decree of foreclosure, while it is proper to state the amount of the decree, such statement is not essential to the validity of the notice. *Stratton v. Reisdorph*. 35 Neb., 314, followed. *Bourke v. Sommers* 761

MORTGAGES—Continued.

51. ———: NOTICE: REDEMPTION: IMPROVEMENTS. While a purchaser in good faith at foreclosure sale, who has made improvements upon the property in the belief that he acquired a good title, may claim compensation for such improvements on redemption by a junior mortgagee not barred by the foreclosure, one who buys with notice of the rights and claims of the junior mortgagee, and that his rights have not been divested by the foreclosure, is not entitled to such compensation. *Jones v. Dutch*..... 673
52. ———: OBJECTIONS FRIVOLOUS. Objections to a confirmation of sale in a foreclosure proceeding examined, and held frivolous and without merit. *Rieck v. Zoller*..... 721
53. ———: OBJECTIONS TO NOTICE FOR IRREGULARITIES IN DECREE. A notice of sale which follows the decree in stating the claims for satisfaction whereof the land is to be sold is not open to objection. Irregularities or errors in the decree must be corrected as such. *Levy v. Hinz*..... 11
54. ———: ORDER OF SALE: COMPLETION BY SHERIFF AFTER TERM. Where an order of sale in a foreclosure proceeding has been regularly issued and placed in the hands of a sheriff of the county in which it was issued during his term of office; he may complete the execution of such order of sale after the expiration of his term. *National Black River Bank v. Wall*.. 316
55. ———: PLEADING: "ACTION AT LAW": OBJECTION AFTER TRIAL. Whether a defendant in a suit to foreclose a mortgage, who has not raised the point in any way in the trial court, should be heard to complain on appeal that the petition lacks the required averment that no proceedings have been had at law, where the plaintiff was permitted to introduce evidence tending to show such fact without objection and the cause was tried upon the theory that it was in issue, *quare*. *Ure v. Bunn*..... 61
56. ———: ———: AMENDMENT IN THIS COURT. In such case the appellee will be permitted to amend to conform to the proofs after submission of the cause in this court, and upon amendment the decree will be affirmed. *Idem*.
57. ———: ———: BURDEN OF PROOF. Pleadings examined, and held that the burden of proof was on defendants. *Omaha Loan & Trust Co. v. Luellen*..... 709
58. ———: ———: GENERAL DENIAL: BURDEN OF PROOF OF "NO ACTION AT LAW." Where, in an action to foreclose a real estate mortgage, the answer is a general denial, the burden is on the plaintiff to make a *prima facie* showing that no action at law has been had for the collection of the debt or any part thereof. *Omaha Savings Bank v. Boonstra*..... 382

MORTGAGES—Continued.

59. ———: **PROOF OF PUBLICATION: AFFIDAVIT: PRIMA FACIE PROOF.** Where the affidavit to a proof of publication alleges that the newspaper in which the publication was made is a legal newspaper, such affidavit is *prima facie* evidence of that fact. *Foster v. McKinley-Lanning Loan & Trust Co.*..... 65
60. ———: **REDEMPTION BY JUNIOR MORTGAGEE.** A subsequent mortgagee who has not been made a party to a suit for foreclosure of a prior mortgage has an absolute right to redeem from the purchaser at foreclosure sale. *Jones v. Dutch*.... 673
61. ———: ———: **COSTS.** All that is required of the junior mortgagee in such a case is that he relieve the property of the prior incumbrance by paying the amount thereof with interest; he is not required to pay the costs of the foreclosure suit to which he was not a party. *Idem*.
62. ———: **SALE: DEPOSIT BY PURCHASER.** A rule of the district court requiring purchasers at a sheriff's or master's sale to deposit \$50 with the sheriff or master as a guarantee of good faith in their purchase, examined, and *held* reasonable. *Green v. Diezel*..... 813
63. ———: **SALE EN MASSE: DISCRETION.** A tract of land consisting of two hundred acres lying contiguously in one section, occupied and cultivated as one farm and mortgaged as a whole, may, in the discretion of the court or officer, be sold upon foreclosure *en masse*, though portions of the tract are in different quarter sections and are separately assessed for taxation. *Pierce v. Reed*..... 874
64. ———: **SALE IN SMALL PARCELS: OBJECTIONS: WHAT MUST BE SHOWN.** In order to set aside a sale of real estate made on a judicial decree, because the land was not offered in the smallest governmental subdivisions, it must be made to appear that the land would have brought more if so offered than it did when offered as a whole. *Franklin County Bank v. Everett* 379
65. ———: ———: **TO HIGHEST BIDDER.** Where the trial court finds, upon the evidence, that the land was sold to the highest bidder actually present at the sale, such finding will not be disturbed unless it is clearly wrong. *Idem*.
66. ———: **SALE UNDER THIRD ORDER OF SALE: PRESUMPTION AS TO PURCHASE PRICE.** Where it appears from the record, that after appraisal of property for sale under foreclosure, order of sale was recalled, and under another order of sale the property was again appraised, and was finally sold under a third order, in the absence of any showing to the contrary, it will be presumed that the property brought two-thirds the amount of each appraisement. *Bowditch v. O'Linn*..... 203

MORTGAGES—Concluded.

67. ———: TAX LIEN: PRIORITIES: PARTIES. The holder of a tax lien is not a necessary party to the foreclosure of a mortgage subsequent in point of time to the tax lien, where the right to foreclose the tax lien has not yet accrued. *Western Land Co. v. Buckley*..... 776
68. ———: TRUSTS: NOTE AND MORTGAGE GIVEN BY TRUSTEE: DEFICIENCY AGAINST TRUST ESTATE. Where the trustee gave a note, secured by mortgage on a portion of the trust property, in settlement of such a claim, promising that the note should be paid in full, and suit to foreclose such mortgage was begun prior to the act of 1897, the trust estate may be held for any deficiency accruing on sale of the mortgaged property. *Stitzer v. Whittaker* 414
69. Limitation of Actions: NOTE BARRED: EFFECT ON MORTGAGE. Amount due on a mortgage is not affected by the fact that an action on the note, which it secures, is barred by the statute of limitations. *Yarnal v. Hupp*..... 1
70. Redemption: EVIDENCE SUFFICIENT. Evidence examined, and found to sustain the finding and decree of the trial court. *Triska v. Miller* 463

MOTION. See APPEAL AND ERROR, 40. •

MUNICIPAL CORPORATIONS.

1. Bonds: DATE: CONCLUSIVENESS: IRRIGATION. The date at which municipal bonds were issued is to be determined from the time at which the municipality actually parted with the custody and control of them, pursuant to contract, and not necessarily from the date which they bear on their face. *Chicago, B. & Q. R. Co. v. Dundy County*..... 391
2. Garbage: FUND FOR REMOVAL: ESTIMATES AND APPROPRIATION IN ADVANCE. Before the city could pay out money for the removal of garbage, or contract to do so, an estimate of the necessary expenses for the current fiscal year must have been made and published, and an appropriation ordinance passed providing a fund therefor. *Kelly v. Broadwell*..... 617
3. ———: POWER TO CONTRACT FOR REMOVAL: STATUTES. Under the statutes in force in the years 1896 and 1897 governing cities of the first class having more than 10,000 and less than 25,000 inhabitants, such cities had the power to contract for the removal of refuse, filth and garbage from private and public premises within their limits and pay a reasonable compensation therefor. *Idem*.
4. ———: REMOVAL OF: EVIDENCE INSUFFICIENT. Evidence examined and held insufficient to sustain a decree in favor of the plaintiff. *Idem*.

MUNICIPAL CORPORATIONS—Continued.

5. **Personal Injuries: INSTRUCTIONS: DEGREE OF CARE.** Plaintiff, while attempting to go from the paved portion of the street to the sidewalk was injured by reason of the defective condition of an intervening meter box. The place of injury was in front of a hotel in a much traveled portion of the city. The adjacent sidewalk was defective, by reason of which travel had been deflected, causing pedestrians to walk near the meter box. *Held*, That the trial court's refusal to instruct the jury that plaintiff was required to exercise a higher degree of care in passing from the paved street to the sidewalk than would be required upon either the street or sidewalk, was not error. *City of South Omaha v. Meyers.* 699
6. **Services Rendered Village: PLEADING PRIOR APPROPRIATION.** Ordinarily, in an action to recover for services rendered a village, a petition, which does not allege a prior appropriation for such services, is vulnerable to a general demurrer. *Lincoln Land Co. v. Village of Grant*, 57 Neb., 70, distinguished. *De Wolf v. Village of Bennett*..... 470
7. **Sidewalks: TAXATION: LIEN: ESTOPPEL.** A levy of a special assessment for the construction of a sidewalk is necessary to the creation of a lien. And where no levy has in fact been made by the city council, no lien will be created by certifying the expenses of the improvement to the county board and extending it as a tax upon lots adjacent to the improvement. The fact that the owner of the premises in front of which it was laid had knowledge that it was being laid, and made suggestions to the party in charge of the work as to the manner in which it should be done, will not operate as a levy of the tax nor estop the owner from denying the existence of a lien for want of a levy of the tax. *Hall v. Moore*.. 574
8. **Streets: CONDITION WHEN REPAIRING.** "The duty ordinarily resting on a city to maintain its streets and sidewalks in a reasonably safe condition for travel in the ordinary mode is remitted during the time occupied in making repairs and improvements." *City of Lincoln v. Calvert*, 39 Neb., 305. *City of South Omaha v. Burke*..... 309
9. —: **CURBING BY PETITION.** The presentation, to the city authorities, of a petition, signed by the requisite number of such owners, is essential to confer jurisdiction on such authorities to order the curbing of a street not ordered to be paved. *Jones v. City of South Omaha*.....551, 554
10. —: **PAVING AND CURBING.** The question in this case having been adjudicated in *Orr v. City of Omaha*, 2 Neb. (Unof.), 771, 90 N. W. Rep., 301; the decree below is modified so as to conform to the rule there announced. *Hicks v. City of Omaha*..... 637

MUNICIPAL CORPORATIONS—Concluded.

11. ———: PAVING BY PETITION. The presentation to the city authorities of a petition, signed by the requisite number of owners of property, is essential to confer jurisdiction on such authorities to pave a street, and charge the cost thereof to the abutting property. Following *Henderson v. City of South Omaha*, 60 Neb., 125. *Jones v. City of South Omaha*....551, 554
12. Warrants: ENJOINING PAYMENT: PRESUMPTIONS: BURDEN OF PROOF. Where one seeks to enjoin the payment of a warrant drawn upon a specific fund, and alleges that no estimate or appropriation was made, or created for its payment, it is incumbent upon him to make competent proof of such facts, and unless he thus overcomes the presumption of official regularity his action must be dismissed. *Kelly v. Broadwell* 617

NEGLIGENCE. See CORPORATIONS, 1. EXPLOSIVES, 1-3. PRINCIPAL AND AGENT, 4. RAILROADS, 1-4. STREET RAILROADS, 1. VENDOR AND PURCHASER, 1.

Primary and Contributory: QUESTIONS OF FACT. Issues, both of primary and of contributory negligence, are ordinarily questions of fact for a jury. *Mathieson v. Omaha Street R. Co.* 747

NEWSPAPERS.

Affidavit of Publisher: MORTGAGES. In the absence of a showing to the contrary the affidavit of the publisher, that the newspaper was one of general circulation in the county, is sufficient to establish the fact that the newspaper was a legal newspaper. *Bourke v. Sommers*..... 761

NEW TRIAL. See APPEAL AND ERROR, 2, 4, 11, 12, 41-45. TRIAL, 27.

NOTARIES. See DEPOSITIONS, 1.

Evidence of Official Character. Signature and seal as a notary public sufficiently establishes, at least *prima facie*, the official character of notary of another state. *Yarnal v. Hupp*..... 1

NOTICE. See BANKS AND BANKING, 3. BONDS. CREDITORS' SUIT, 10. MORTGAGES, 34, 51. TAXATION, 8, 9. VENDOR AND PURCHASER, 2.

NUISANCE. See EXPLOSIVES, 3. WATERS AND WATER COURSES, 2.

Explosives: PLEADING: DAMAGES. A petition, by which it is sought to make one liable in damages for doing an unlawful act or maintaining a public nuisance, must state sufficient facts to overcome the presumption that the act complained of was lawful, or show that the doing of the act itself amounted to a public nuisance. *Bianki v. Greater American Exposition* 656

NUNC PRO TUNC. See REFERENCE, 2.

OCCUPANCY. See ADVERSE POSSESSION, 2, 3.

OFFICER. See BANKS AND BANKING, 1, 2.

OWNERSHIP. See ATTACHMENT, 4-7. BILLS AND NOTES, 1.

PARTIES. See ASSIGNMENTS. DIVORCE, 2, 3. JUDGMENT, 11, 12.
MORTGAGES, 67. TRIAL, 30, 31. TRUSTS, 5.

1. **Action, Causes of: MISJOINDER: OBJECTIONS, WHEN MADE: WAIVER.** An objection of misjoinder of causes of action and of parties defendant, must be taken before going to trial or the objection will be deemed waived. *Curran v. Hageman*.. 779
2. **Competency: PLEADING.** A mere denial that plaintiffs or either of them are competent to sue raises no issue of fact. *Chamberlain Banking House v. Noyes, Norman & Co.*.... 550
3. **Defect of: OBJECTION AFTER SUBMISSION.** The objection that there is a defect of parties, in this court, must be made before the case is finally submitted on its merits or it will be considered waived. *Blanki v. Greater American Exposition* 656
4. **Description of, as "et al.": EFFECT IN PETITION IN ERROR.** The words "et al." following the names of parties to a petition in error are not a sufficient designation of any persons not expressly named in the petition, even though such persons were parties before the inferior tribunal. *Brabham v. County of Custer*..... 801
5. **Necessary and Proper.** A party will not be barred of his rights by the decree in an action to which he was neither a necessary nor a proper party defendant, and whose rights in such action were not litigated or in fact determined. *Western Land Co. v. Buckley*..... 776
6. **Real Party in Interest Under Statute: FORMAL DEFECT IN PLEADING: GENERAL DENIAL.** Under section 29 of the Code of Civil Procedure, every action is required to be prosecuted in the name of the real party in interest, with certain exceptions. But where, in an action by a minor prosecuted on his behalf by his next friend, there is a wrong collocation of the names, and it is apparent and obvious from the petition who the real party in interest is, the defect will be held to be formal merely, and can not be raised by a general denial. *Kyner v. Laubner*..... 370

PARTITION. See MORTGAGES, 5.

1. **Evidence: PROPER ALLOWANCES FOR TAXES.** Evidence examined, and held that all proper allowances for taxes were made. *Jolliffe v. Maxwell*..... 244
2. **Improvements: VALUE SET OFF AGAINST RENTS: PREJUDICE.** Where the trial court in an action for partition makes no

PARTITION—Concluded.

allowance for improvements voluntarily placed on the property by a joint owner or co-tenant, and it is apparent that the value of such improvements, and the rents and profits were set off against each other, it further appearing that the appellants were not injured thereby, such action presents no ground for a reversal of the judgment. *Idem.*

PARTNERSHIP. See ATTORNEY AND CLIENT, 3. JUDGMENT, 5.

1. Dissolution: COMPENSATION: CONTINUANCE OF BUSINESS.

Where a subsisting partnership upon equal terms dissolves, and it appears that time, skill and labor have been expended by a partner in the continuance of the partnership business, which inures to the general benefit, such partner should receive a reasonable compensation for the profits resulting to all from his extra labor and skill, based upon the nature of the business, the difficulties attending the undertaking, and the value of the results attained. *Lamb v. Wilson*..... 496

2. ———: ———: SUBSEQUENT BUSINESS: ATTORNEYS. A law firm of three members, each sharing equally in the profits, dissolved, assigning undisposed of cases to the several members, except one case, pending in the supreme court, which was not assigned. Judgment therein was reversed, and a retrial was conducted by two of the members of the old firm, who prosecuted the case to a successful termination and collected the fee. *Held*, The value of the services rendered by the old firm in the former trial and by the two members in the second trial respectively being ascertained, and the fee collected insufficient to pay both sums, the fee should be distributed *pro rata* between the dissolved firm and the two members. *Idem.*

3. ———: ———: WINDING UP AFFAIRS. It is a general rule that neither partner of a dissolved firm is entitled to compensation for services rendered in winding up partnership affairs, unless it is expressly agreed otherwise or can be fairly implied from the circumstances. *Idem.*

4. ———: ———: ———: CONTRACTS. In the absence of a contract between partners touching the nature or amount of services to be rendered by each in the prosecution of the common enterprise, one partner is not entitled to compensation for extra attention, labor or services devoted to the partnership business, but by agreement with his associates he may become so entitled. *Idem*..... 506

5. ———: LAW FIRM: SUBSEQUENT TRIAL OF CASES: BY MEMBERS. Where a law firm dissolves, assigning undisposed of cases to the several members, and the agreement of dissolution is supported by sufficient consideration, each member who in good faith undertakes to carry out his part of the

PARTNERSHIP—Concluded.

agreement is entitled to prosecute to completion the cases assigned to him, and services rendered by other members to him in such cases will be held to be gratuitous. *Idem*... 496

6. ———: ———: ———: **NEW CONTRACT.** Where a law firm dissolves, and one of the members is subsequently employed under a new contract by a client of the old firm in a case commenced before dissolution, and which has been assigned to such member, a settlement made between the members of fees due to the firm in such case, made with knowledge of such subsequent employment, will be held to have been made in view of such employment, and will not be opened. *Idem*.
7. ———: **MUTUAL CONTRACTS: CONSIDERATION.** Mutual promises afford a consideration for each other sufficient to constitute a binding contract between the parties making them, to do the things promised. *Idem*..... 505
8. **Pleading: FIRM NAME: STATUTES.** Allegation that a certain named firm is a partnership organized and doing business in the state of Nebraska is sufficient to authorize the carrying on of the action under the firm name under section 24 of the Code. *Chamberlain Banking House v. Noyes. Norman & Co.*..... 550
9. ———: **NEBRASKA PARTNERSHIP.** An allegation that a certain firm, named as plaintiff, consists of certain named parties who are pleading, shows an action carried on by the partners, and it is not necessary that it be either alleged or proved that the partnership is a Nebraska one. *Idem*.

PAUPERS.

Support of, by County. *County of Polk v. County of Nance*... 99

PAYMENT. See **ACCORD AND SATISFACTION**, 2, 3. **BENEFICIAL ASSOCIATION**, 1, 3. **BILLS AND NOTES**, 2, 3, 9, 10. **JUDICIAL SALES**, 4. **MORTGAGES**, 2, 45. **MUNICIPAL CORPORATIONS**, 12. **PLEADING**, 3. **TAXATION**, 5. **TRUSTS**, 3, 4. **VENDOR AND PURCHASER**, 3, 4.

1. **Costs: TENDER: ACCEPTANCE.** Where, on motion to make a decree absolute, which was contingent on the payment by the plaintiff of a certain sum and the costs in a certain action, it appeared that the plaintiff had complied with the decree on his part, save that through oversight he had omitted to pay a small item of costs which he thereupon tendered, the tender should have been accepted and the rule granted. *Commercial State Bank of Crawford v. Ketcham*..... 839
2. **Extension of Time: CONSIDERATION: PROMISE TO DO WHAT PROMISOR IS BOUND TO DO.** Neither the promise to do nor the actual doing of that which the promisor is by law or sub-

PAYMENT—Concluded.

- sisting contract bond do is a sufficient consideration to support a promise in his favor. *Esterly Harvesting Machine Co. v. Pringle*, 41 Neb., 265. *Allen v. Plasmeyere*..... 187
3. **Question Does Not Arise.** On the facts stated, *held* that the question of the voluntary payment by one party of the debt of another does not arise. *Columbus State Bank v. Carrig* 592

PENALTIES. See CHATTEL MORTGAGES, 2.

PLEADING. See APPEAL AND ERROR, 5, 38, 48. BENEFICIAL ASSOCIATIONS, 4. CONTEMPT, 3. CONTRACTS, 8, 12. CONVERSION, 1, 2. CORPORATIONS, 2, 3. CREDITORS' SUIT, 8. FORCIBLE ENTRY AND DETAINER, 3. INJUNCTION, 3. INSURANCE, 2. JUDGMENT, 3. MONEY RECEIVED, 1. MORTGAGES, 26, 55-58. MUNICIPAL CORPORATIONS, 6. NUISANCE, 3. PARTIES, 2, 6. PARTNERSHIP, 8, 9. QUIETING TITLE, 1-3. SALES, 1.

1. **Admissions in Answer.** Answer examined, and *held* not to be an admission of the allegations of the petition. *Triska v. Miller* 463
2. **Amendments: DISCRETION.** It is not an abuse of discretion for a court to allow a formal amendment to a pleading during the progress of a trial, in the absence of a showing that such amendment was prejudicial to a party objecting thereto. *Donovan v. Hibbler*..... 652
3. **Contract of Sale: RECOVERY OF PAYMENTS: PETITION INSUFFICIENT.** Petition examined, and *held* not to state a cause of action. *Lowry v. Robinson*..... 145
4. **Defenses Inconsistent: ELECTION: WILLS: DISTRIBUTION.** Defenses to a petition for distribution under a will which allege that the cross-petitioner was omitted by mistake from the will and also that she is provided for in the third clause of the will, are inconsistent, and a rule of the county court requiring an election on which of these defenses the cross-petitioner will proceed is fully warranted. *Bollinger v. Knox* 811
5. **Denial on "Information and Belief."** To authorize the denial of an allegation in a petition, a want of belief is sufficient, and it is not improper to accompany the denial with a statement that the party making it has no knowledge or information on which to form a belief. *McIntosh v. City of Omaha* 408
6. **Evidence: SALES.** A petition in an action to recover the value of corn which sets forth the correspondence between the parties may be open to the charge of pleading evidence, but if the correspondence discloses that the price and terms of payment were communicated to the prospective seller

PLEADING—Concluded.

though no particular corn was mentioned, the petition is not, on account of such omission, objectionable as failing to state a cause of action if it also alleges the delivery of the corn. *Jaques v. Dawes*..... 753

7. **Facts Not Evidence: PRINCIPAL AND AGENT.** A pleading should state the ultimate fact alleged to exist, and not the evidence by which that fact may be proved. It is proper, therefore to allege in a petition that a contract was entered into by the defendant, although the proof may be that he made the contract through the medium or instrumentality of an agent. *Blotcky v. Miller*..... 344

8. **General Denial: FORM.** An answer that the defendant "states and alleges that he denies each and every allegation" of the petition is a sufficient general denial, though not in commendable form. *Reiss v. Argubright*..... 756

9. **Objection of No Cause of Action: AVAILABLE WHEN.** Where no cause of action appears in the petition, the objection on that ground is good at any stage of the action. *Tracy v. Grezaud* 390

10. **Objection to Petition After Trial Begun.** Petition examined, and held sufficient to withstand an objection raised after trial begun. *Zug v. Forgan*..... 149

11. **Reply, New Cause of Action in: JOINDER OF ISSUE.** While it is not the province of a reply to introduce a new cause of action, yet if all parties and the trial court treat the issue presented by the reply as if it were regularly and formally joined, the case will be so considered in the appellate court. *Elder v. Webber*..... 534

12. **Treated at Trial as Though Filed: APPEAL.** Where pleadings are not marked filed by the clerk, but are treated by the trial court as though they were actually filed, they will be so treated on appeal to this court. *Jolliffe v. Maxwell*..... 244

PREFERENCES. See FRAUDULENT CONVEYANCES, 5.

PREJUDICE. See APPEAL AND ERROR, 49, 50, 59, 60. BASTARDY, 3. MORTGAGES, 18. PARTITION, 2. SCHOOLS AND SCHOOL DISTRICTS, 1. TRIAL, 16.

PRESUMPTIONS. See APPEAL AND ERROR, 8, 19. BASTARDY, 4. BENEFICIAL ASSOCIATIONS, 4. CONTRACTS, 7. EVIDENCE, 11. EXCEPTIONS, BILL OF, 3. LANDLORD AND TENANT, 6. MORTGAGES, 13, 19, 66. MUNICIPAL CORPORATIONS, 12. VENDOR AND PURCHASER, 1.

PRINCIPAL AND AGENT. See EXPLOSIVES, 2. PLEADING, 7.

1. **Agency to Pay Debt of Principal: CONFLICTING EVIDENCE.**
An agency to pay the debts of a principal with the resources

PRINCIPAL AND AGENT—Continued.

- of the agent is not one greatly to be desired by the agent, nor one which should be imposed on an unwilling victim of such an alleged undertaking on doubtful and conflicting testimony. *Angle v. Manchester* 252
2. **Agent Representing Both Vendor and Purchaser: BONA FIDES.** When a party acts as agent for both the seller and the buyer, and that is known to them, the law exacts the most perfect good faith, honesty and fairness on his part, and will not adjudge the specific performance of a contract thus made unless it has been entered into with perfect fairness and without misapprehension or misrepresentation. *Morgan v. Hardy*, 16 Neb., at page 437, followed. *Andrew v. Whitwer* 55
3. **Bad Faith of Agent: EVIDENCE OF MERE NEGLIGENCE IMMATERIAL.** The cause of action being for bad faith on an agent's part in taking an assignment of a lien with notice that the agent's principal claimed an interest in it, evidence tending only to show negligence in collecting is immaterial. *Crane Company v. Columbus State Bank*..... 339
4. **Evidence Sufficient.** Evidence examined, and held sufficient to sustain the judgment of the district court. *Andrew v. Whitwer* 55
5. ———. Evidence examined, and held sufficient to establish that the Globe Investment Company in the collection of the principal sum due upon the loan was the agent of the plaintiff. *Gathercole v. Peck*..... 226
6. ———. Evidence held to sustain verdict. *Crane Company v. Columbus State Bank* 339
7. **Instructions: AGENCY ADMITTED FOR CERTAIN PURPOSE SUFFICIENT FOR ALL.** The giving of an instruction as to the creation of an agency to collect, held, not prejudicial error where the jury were instructed that an admitted agency to present a draft for acceptance was sufficient agency for all purposes of the action. *Idem*.
8. ———: **DEFINITION OF AGENT.** An instruction that an agent is one "authorized," "empowered" and "directed" by another to transact business which the agent "undertakes" and "agrees" to do, held not to require express words of authorization or agreement in order to constitute an agency. *Idem*.
9. **Settlement: RECEIPT IN FULL.** One who, on a settlement with his principal of transactions by him as agent, writes a receipt in full of all demands and attaches it to a draft for the amount the other party has offered to pay for such a receipt, can not, after taking the money, in the absence of

PRINCIPAL AND AGENT—Concluded.

fraud or mistake, renew a claim previously in dispute between the parties. *Connor v. Etheridge*..... 555

10. ———: ———: **MISTAKE.** The fact that the party taking the money supposed that certain checks, for whose payment the other party refused to indemnify him unless they were produced, were irrecoverably lost, and also supposed his claim for their payment could not be maintained without them, does not constitute a mistake which permits the disregarding of the settlement and a recovery of the amount of the checks after finding them, no fraud being alleged, and the nature and amount of the claim being well known to both parties. *Idem*.

PRINCIPAL AND SURETY. See **BILLS AND NOTES**, 11.

PRIORITIES. See **MORTGAGES**, 67.

PRIVILEGED COMMUNICATIONS. See **WITNESSES**, 1, 2.

PROBABLE CAUSE. See **MALICIOUS PROSECUTION**, 1.

PROBATE. See **JUDICIAL SALES**, 2.

QUIETING TITLE.

1. **Pleading Legal or Equitable Estate: INSUFFICIENT.** A petition merely alleging a patent to a city council under "the town-site act" of congress, that two individuals have always constituted that council, a conveyance by one of them jointly with a third party of the land, subsequent *mesne* conveyances by which this title came to plaintiffs, a platting of the land, occupation of it by numerous persons as a town site for about six years and then the vacation of the plat by the county commissioners, does not disclose a legal or an equitable estate in two plaintiffs suing jointly to quiet title, although one of them is one of the persons alleged to constitute the council. *Tracy v. Grezard*..... 890
2. **Pleading: PETITION SUFFICIENT.** Petition examined, and held to set forth sufficient facts to show a cause of action in favor of plaintiffs and against defendant. *Curran v. Hageman* 779
3. ———: **REPLY, NEW CAUSE OF ACTION IN.** Where a petition alleges facts showing that the legal title to the premises is in plaintiff, and that defendant is asserting title to the premises adverse to plaintiff under a deed from a stranger, a reply which alleges that plaintiff joined in a deed from defendant's grantor, but by express agreement the premises were to be held in trust for plaintiff, introduces a new cause of action. *Elder v. Webber*..... 534
4. **Trust, Express: EVIDENCE INSUFFICIENT.** Evidence exam-

QUIETING TITLE—Concluded.

ined, and *held* not to support the finding of the trial court that the land was held by defendant under an express trust. *Idem.*

5. ———: **VALIDITY: STATUTES.** Under the provisions of section 3, chapter 32, Compiled Statutes, an express trust in real estate is unenforceable unless reduced to writing. *Idem.*
6. **Trust, Resulting: EVIDENCE INSUFFICIENT.** Evidence examined, and *held* insufficient to establish a resulting trust. *Idem.*

RAILROADS.

1. **Highways: CARS ON SIDE-TRACK: DEGREE OF CARE.** If a railroad company, in the ordinary conduct of its business, leaves a row of freight cars upon a side-track at right angles to a public crossing, so as to partially obstruct the view of persons passing over it, such fact of itself does not render the company liable for accidents occurring at the crossing, but merely imposes a duty of greater care both upon the company and upon those who use the highway. *Chicago, B. & Q. R. Co. v. Roberts*..... 425
2. ———: **DEGREE OF CARE.** The same degree of care is required of a railroad company operating its road across a public highway and of persons using the highway; each is bound to use such care in order to avoid accidents as is commensurate with the danger involved under the circumstances of the particular crossing. *Idem.*
3. ———: **LEAVING CARS ON: NEGLIGENCE.** A railroad company may properly leave its cars standing in the highway at a crossing for short periods when necessary in the reasonable conduct of its business. But to leave such cars in or upon the highway longer than is needful for such purpose is negligence. *Idem.*
4. ———: ———: ———: **PROXIMATE CAUSE: LIABILITY.** In order to hold a railroad company liable for an injury received at a crossing where cars were suffered to stand upon the highway longer than necessary in the reasonable conduct of the company's business, it must appear that the negligence in so leaving them was the proximate cause of the injury. *Idem.*
5. ———: **RIGHT OF WAY.** While the rights of the railroad company and of persons using the highway at the crossing are equal, the railroad company has the superior right of passage; and, if otherwise exercising due care, it commits no wrong in running its cars across the highway in front of approaching teams. *Idem.*
6. **Personal Injuries: DAMAGES.** A railroad company is not liable for injuries due to horses taking fright at the ordinary operation of a hand-car. *Idem.*

RECEIVER. See CROPS, 1. HOMESTEAD, 3, 4.

1. For Mortgaged Property. *First National Bank of Greenwood v. Reece*, 64 Neb., 292, 89 N. W. Rep., 804, followed. *Joslin v. Williams* 193
2. ———: RIGHT OF WIDOW OF MORTGAGOR OVER MORTGAGEE: STATUTES. The mortgagee of a homestead is not entitled to a receiver as against the widow of the mortgagor to whom the property has passed under section 17, chapter 36, Compiled Statutes. *Idem*..... 194

RECORDS. See HIGHWAYS, 1, 2.

REDEMPTION. See MORTGAGES, 27, 51, 60, 61, 70.

REFERENCE. See APPEAL AND ERROR, 51.

1. Filing Report Out of Time: IRREGULARITY. While a referee has no power or jurisdiction to proceed with a hearing or perform any acts of a judicial nature after expiration of the time fixed by the court for making his report, filing the report out of time is a mere irregularity and does not preclude the court from acting thereon in its determination of the cause. *Oreedon v. Patrick*..... 459
2. Order of Continuance Not in Record: NUNC PRO TUNC ORDER. A finding that the court at a previous term had determined that it was necessary and advisable to continue a pending reference, but through inadvertence had made no notation thereof on the trial docket, so that no order was spread upon the journal, is sufficient to sustain an order directing entry of an order of continuance *nunc pro tunc*, without any finding in such terms that the court made the order directed to be entered. *Idem*.

RELEASE. See CHATTEL MORTGAGES, 2.

RENTS. See LANDLORD AND TENANT, 5, 6. MONEY RECEIVED, 1. PARTITION, 2.

REPLEVIN. See APPEAL AND ERROR, 52.

1. Chattel Mortgages: IDENTITY OF PROPERTY: DIRECTING VERDICT. In an action for the recovery of specific personal property, where the plaintiff claims under a chattel mortgage, if, from the pleadings and the evidence, it is impossible to ascertain whether the property seized under the writ is the identical property covered by the mortgage, the plaintiff cannot recover. *Perry Live Stock Commission Co. v. Barto* 654
2. From Stranger: INTERVENTION. When chattels are taken under a writ of replevin from the possession of a person not a party defendant to the action, he is entitled, on motion, to be admitted to defend his possession without reference to

REPLEVIN—Concluded.

- the statute on the subject of intervention. *First Nat. Bank of Chadron v. Hughes*..... 823
3. Judgment Broader Than Verdict: VALIDITY. A judgment, in replevin, which is broader than the verdict, is erroneous. *Foster & Smith Lumber Co. v. Leisure*..... 237
4. Judgment in Alternative. A replevin judgment "that said defendant have and recover of and from the plaintiff the property heretofore replevied, or the sum of \$794, and the further sum of \$39.99 as damages, together with costs," is not open to objection as not being in the alternative. *Skow v. Locke* 176
5. Title, Recovery on Strength of. In replevin the plaintiff must recover, if at all, upon the strength of his own title and not because of the weakness of that of his adversary. *First Nat. Bank of Chadron v. Hughes*..... 823

RESCISSION. See VENDOR AND PURCHASER, 3, 4.

RES JUDICATA. See JUDGMENT, 13, 14.

REVIVOR. See JUDGMENT, 12, 15. LIMITATION OF ACTIONS, 7.

SALES. See BROKERS. CHATTEL MORTGAGES, 5, 6. CROPS, 2. PLEADING, 6. TAXATION, 7.

1. Contracts: PLEADING: TITLE. On the sale of a threshing machine it was agreed between the vendor (plaintiff in error) and vendee, that the vendor should collect all accounts due the vendee arising from the use of the machine, applying one-half of said collections to the amount due him on the sale of the machine, paying the other half to the vendee. From the statements of the petition it appears that the machine became the property of a third party who did threshing for the defendant in error, the bill for which he refused to pay to the plaintiff who brought suit therefor, his petition alleging the facts above set forth. *Held*, That a demurrer to the petition was properly sustained. *Rydson v. Larson* 898
2. Evidence Sufficient. Evidence examined, and found sufficient to sustain the verdict of the jury and the judgment thereon. *Hammond & Hammond v. King*..... 790
3. Interpleader: STATUTES. One who has purchased corn relying upon the title of the seller, but who is later advised of the claims of a third party, may protect himself in the event of suit on behalf of either claimant by filing an affidavit in the nature of a bill of interpleader provided for by section 48 of the Code. *Jaques v. Dawcs*..... 752

SCHOOLS AND SCHOOL DISTRICTS.

1. **Forming New District: RULINGS OF SUPERINTENDENT: PREJUDICE.** The rulings of the superintendent, fixing the time of hearing petitions for the formation of such district, and on applications for a continuance, examined, and held not prejudicial error. *Biart v. Myers*..... 196
2. ———: **SUBSTANTIAL COMPLIANCE WITH STATUTE.** While a superintendent of public instruction acts judicially in forming a new school district from territory embraced within the boundaries of other districts, it does not follow that his findings and orders in the premises must be entered with all the formality of a judgment of a court of law; if the record shows a substantial compliance with the statute, it is sufficient. *Idem*.

SET-OFF AND COUNTER-CLAIM. See **BILLS AND NOTES**, 11.

SETTLEMENT. See **JUDGMENT**, 16. **PRINCIPAL AND AGENT**, 9, 10.

SHERIFFS AND CONSTABLES. See **MORTGAGES**, 12, 54.

SIDEWALKS. See **MUNICIPAL CORPORATIONS**, 7.

SIGNATURES. See **COURTS**, 2. **WILLS**, 4.

SPECIFIC PERFORMANCE. See **CONTRACTS**, 8.

STATUTES. See **APPEAL AND ERROR**, 54. **ARREST**, 3. **ATTACHMENT**, 1, 8. **BANKRUPTCY**, 4, 5. **BENEFICIAL ASSOCIATIONS**, 4. **CHATTEL MORTGAGES**, 6. **COSTS**, 2. **EQUITY**, 3. **FORCIBLE ENTRY AND DETAINER**, 1. **FRAUDS, STATUTE OF**, 3. **HOME-STEAD**, 5. **LIMITATION OF ACTIONS**, 1, 8. **MORTGAGES**, 3, 23, 31, 33, 35, 36. **MUNICIPAL CORPORATIONS**, 3. **PARTIES**, 6. **PARTNERSHIP**, 8. **QUIETING TITLE**, 5. **RECEIVER**, 2. **SALES**, 3. **WITNESSES**, 2, 3.

STAY. See **BANKRUPTCY**, 2, 6.

STREET RAILROADS. See **WITNESSES**, 4, 5.

1. **Individuals: NEGLIGENCE: DEGREE OF CARE.** Electric street railway companies and ordinary travelers upon the thoroughfares of a city, are obligated to observe equal degrees of care to avoid accidents. Neither have a right of way superior to that of the others. *Omaha Street Railway Co. v. Cameron*, 43 Neb., 297, followed. *Mathieson v. Omaha Street R. Co.* 747
2. **Ordinance Regulating Speed: EVIDENCE: PERSONAL INJURIES.** An ordinance regulating the speed of electric street cars is immaterial in a case in which it is not shown at what rate of speed a car, alleged to have caused an injury, was, in fact, at the time moving. *Idem*..... 743
3. ———: ———: ———. When in an action against a street railway company for damages resulting from a collision

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with a private vehicle, the rate of speed of a railway car is material to the controversy, and there is evidence from which it may be ascertained, a city ordinance regulating such speed is competent evidence as bearing upon the question of negligence. *Idem*..... 747

STREETS. See MUNICIPAL CORPORATIONS, 8-11.

SUBROGATION. See GAMING, 6.

SUBSCRIPTIONS. See CONTRACTS, 9, 10. CORPORATIONS, 4-6.

SUICIDE. See INSURANCE, 3.

SURVEYS. See BOUNDARIES, 1-6.

SUSPENSION. See BENEFICIAL ASSOCIATIONS, 3, 5-8.

TAXATION. See COVENANTS, 1. JUDGMENT, 4. JUDICIAL SALES,

1. MANDAMUS, 3, 4. MORTGAGES, 67. MUNICIPAL CORPORATIONS, 7. PARTITION, 1. WATERS AND WATER COURSES, 1.

1. Foreclosure. *Hillers v. Yeiser*..... 394

2. ———: EVIDENCE INSUFFICIENT. Evidence examined, and held, insufficient to sustain the judgment of the district court. *Idem*..... 396

3. ———: LIMITATION OF ACTIONS. Under the repeated decisions of this court, a party may bring his action to foreclose a tax lien upon property at any time within five years from the end of the two years within which the owner of the property has a right to redeem from the tax sale. *Western Land Co. v. Buckley*..... 776

4. ———: PART OF TAX ILLEGAL: INTEREST: ATTORNEY'S FEES. In an action for the foreclosure of a tax lien, the court rejected a portion of the taxes as illegal, but allowed the plaintiff interest and attorney's fees therefor. *Held, Error. Hall v. Moore* 574

5. ———: PAYMENT OF TAXES AND COSTS ON DAY OF SALE. A tax sale is not rendered invalid by failure of the purchaser to pay the taxes and costs to the treasurer on the day of the sale when the delay is due to inability of the treasurer, with the clerical force at his disposal, to comply with the requirements of the law on that day, and the money is paid as soon as in due course of the business of his office he can receive it and properly receipt for it. *Ure v. Bunn*..... 61

6. Personal Property Lien: EXTENT: TIME WHEN LIEN BECOMES FIXED. Taxes, assessed on personal property, are a lien, not only on the personal property assessed, but on all such property subsequently acquired, from the time the tax-list is delivered to the county treasurer, and subsequent pur-

TAXATION—Concluded.

- chaser of such property takes it subject to such lien. *Foster & Smith Lumber Co. v. Leisure*..... 237
7. **Sale: VALIDITY, WHEN PORTION OF TAX INVALID: ASSIGNMENTS.** The fact that a portion of the taxes for which lands are sold is illegal does not invalidate the sale where a portion of such taxes is valid, as such sale merely operates as an assignment of the lien for taxes. *Hall v. Moore*..... 574
8. **Special Assessments: CANCELLATION: NOTICE.** *Waddell v. County of Gage*..... 515
La Selle v. County of Gage..... 515
Snyder v. County of Gage..... 515
9. ———: **NOTICE: EQUALIZATION.** *Powers v. County of Gage*. 585

TELEGRAPHS AND TELEPHONES.

1. **Damages: PHYSICAL AND MENTAL SUFFERING: AMOUNT NOT EXCESSIVE.** Where by reason of the delay in delivering such message the labor of a woman in confinement is unduly prolonged, a verdict for \$950 as damages for the additional suffering in body and mind on account of the physician's failure to attend is not so excessive as to be presumptively the result of passion and prejudice. *Western Union Telegraph Co. v. Church*..... 22
2. ———: **KNOWLEDGE OF URGENCY.** The following telegram was delivered to a telegraph company for transmission to a physician: "Come at once to ———." It appeared that the professional character of the addressee was well known to the agents of the company at both the sending and receiving offices. *Held*, Sufficient to charge the company with knowledge that the telegram was urgent and required reasonable promptness in its delivery. *Idem*.
3. ———: **FAILURE TO DELIVER MESSAGE: PHYSICAL AND MENTAL SUFFERING.** Where, in an action against a telegraph company for failure to deliver a message summoning a physician to attend a woman in confinement, in consequence of such delay the physician does not arrive until after his services are no longer required, substantial damages may be recovered for any increased physical and mental suffering caused to the mother by reason of the physician's absence. *Idem*.
4. ———: ———: **MEASURE OF DAMAGES.** In an action against a telegraph company for negligent failure to deliver a telegram, the damages recoverable are such as flow naturally and directly from the failure of the company to deliver the telegram; or such as it may be deemed would have been in the contemplation of the parties had they, at the time the

TELEGRAPHS AND TELEPHONES—Concluded.

telegram was delivered for transmission, directed their attention to the probable and natural consequences of a breach on the part of the company. *Idem*.

TENDER. See BENEFICIAL ASSOCIATIONS, 7. PAYMENT, 1.

TITLE. See REPLEVIN, 5. SALES, 1. VENDOR AND PURCHASER, 5.

TRANSCRIPT. See APPEAL AND ERROR, 54.

TRESPASS. See ADVERSE POSSESSION, 4. INJUNCTION, 4-5. LANDLORD AND TENANT, 6.

TRIAL. See APPEAL AND ERROR, 1.

1. **Abstract Instruction Not Applicable to Case.** Not error to refuse an abstractly correct instruction which has no direct application to the evidence in the case. *Skow v. Locke*..... 176
2. **Burden of Proof: INSTRUCTIONS.** It is reversible error to give an instruction which places the burden of proof upon the wrong party. *Anderson v. Kanno*..... 686
3. **Directing Verdict.** It is not reversible error for the trial court to direct the jury to return a verdict for one of the parties where, upon the evidence, no other verdict than the one directed can be sustained. *Zimmerman v. Kearney County Bank* 323
4. ———: **EVIDENCE INSUFFICIENT.** When the plaintiff has rested his case without sufficient evidence to sustain a verdict in his favor, the court should instruct the jury to return a verdict for the defendant. *Palmer v. Fidelity Mutual Fire Ins. Co.*..... 741
5. ———: **INSTRUCTIONS.** When the undisputed facts entitle the successful party to the direction of a verdict, error in the giving or refusing to give certain instructions, is error without prejudice as to the other party. *Columbus State Bank v. Carrig*..... 592
6. **Evidence Conflicting: INSTRUCTION AS TO WEIGHT OF SURROUNDING CIRCUMSTANCES.** An instruction "The jury are instructed that where the testimony of witnesses is irreconcilably conflicting, they should give great weight to the surrounding circumstances in determining which witness is entitled to credit," is prejudicial error where the vital elements of the case are affirmed by one party and denied by the other in the testimony. *Skow v. Locke*..... 176
7. **Evidence: DIRECTING VERDICT: INFERENCES BASED ON TESTIMONY.** The inferences which may be drawn from the testimony in determining the propriety of a direction to find a verdict for one of the parties must have some reasonable

TRIAL—Continued.

- foundation in the facts shown; mere guess-work and conjecture will not be indulged in. *Jones v. First Nat. Bank of Lincoln*..... 43
8. ———: **FRAUD: MISCONDUCT OF COUNSEL.** *Reiss v. Argu-bright* 816
9. ———: **INTRODUCTION OF: DIRECTING VERDICT.** When the answer is a general denial and the plaintiff has produced evidence tending to prove the allegations of his petition, it is error to refuse to permit the defendant to introduce contradictory evidence and to instruct the jury to return a verdict for the plaintiff. *Nelson v. Metz Bros. Brewing Co.*..... 81
10. ———: **AUTHENTICITY OF DOCUMENT: QUESTION FOR JURY.** Where there is evidence tending to show the authenticity of a document sufficient, if believed, to establish it, the jury should pass upon it and its admission is no error. *Skow v. Locke*..... 176
11. **Examination of Witnesses: OBJECTION TO ENTIRE QUESTION, GOOD AS TO PART.** An objection to an entire question put to a witness calling for testimony, part of which is admissible and part inadmissible, is properly overruled, and error can not be predicated on such ruling. *Western Union Telegraph Co. v. Church*..... 22
12. **Impeaching Verdict by Affidavits of Jurors: FINDING: APPEAL AND ERROR.** Affidavits of jurors should not be received to impeach their own verdict; but where they have been so received and have been opposed by counter affidavits and the issue of fact thus made has been tried by the court, its finding and determination thereon will not be disturbed unless manifestly wrong. *Canon v. Farmers' Bank of Cook*. 348
13. **Instructions: ASSUMING FACTS.** An instruction which assumes the existence of a state of facts, which the jury has no right to find, there being no evidence in support thereof, is erroneous. *Raynor v. City of Wymore*..... 51
14. ———: **AS TO WEIGHT OF EVIDENCE.** The giving of correct instructions, will not cure the error of one which invades the province of the jury as to determining the weight of evidence. *Skow v. Locke* 176
15. ———: **CHANGING ISSUE.** An instruction which seeks to state the issues and only changes them by adding specific facts, which have been shown in evidence without objection, and does not alter their legal effect, is not ground for reversal. *Bank of Callaway v. Henry*..... 629
16. ———: **CORRECT BUT NOT APPLICABLE: PREJUDICE.** The giving of an instruction which is correct as an abstract proposition of law although not applicable to the issues, if in no

TRIAL—Continued.

- wise prejudicial to the party complaining, is not reversible error. *McClary v. Stull*, 44 Neb., 175. *Canon v. Farmers' Bank of Cook*..... 348
17. ———: DEFENSES. An instruction to the jury to find for defendant if they conclude that either of two defenses claimed is true, is not reversible error, though one of the defenses fails to state necessary facts, which, however, are undisputed in the testimony. *Bank of Callaway v. Henry*..... 629
18. ———: INCOMPLETE FOLLOWED BY CORRECT: VERDICT. A judgment will not be reversed because of the giving of an incomplete instruction where it is followed by one on the same point which is in all respects correct, and where the verdict on that point is the only one warranted by the evidence. *Canon v. Farmers' Bank of Cook*..... 348
19. ———: ISSUES. An instruction presenting a new issue in the case, which has not been raised by the pleadings or litigated on the trial, is properly refused. *Hammond & Hammond v. King*..... 790
20. ———: MISSTATING AMOUNT SUED FOR: OTHERS STATING IT CORRECTLY: VERDICT CORRECT. Where the correct amount sued for is repeatedly stated in a lengthy set of instructions, one that the jury should under certain circumstances find for the plaintiff in "the full amount sued for, to wit: \$2,969.20 with interest," etc., is not prejudicial error, though the full amount sued for was only \$1,384.20 and interest, where the verdict is expressly for the latter amount and certain interest which is expressly computed and stated in the verdict. *Doe v. United States of America*..... 405
21. ———: NOT BASED UPON EVIDENCE. Instructions to the jury must be based upon and be applicable to the evidence; and it is not error to refuse to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred. *Parker v. Taylor*..... 318
22. ———: OF COURT INACCURATE: TENDER OF CORRECT ONE: WAIVER. Where the trial court undertakes to instruct the jury as to the issues involved in a cause on trial before them, he should state the issues fully, accurately and fairly; but where such instruction is incomplete, vague or uncertain, counsel should tender an instruction free from the defect urged and obtain a ruling thereon, in order to lay the basis for complaint upon review; otherwise the error, if any, will be deemed to have been waived. *City of South Omaha v. Meyers* 699
23. ———: ON ISSUE NOT RAISED IN PETITION: EVIDENCE ON SAME ISSUE ADMITTED WITHOUT OBJECTION. Although evi-

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- dence thereon may have been admitted without objection, if the defendant objects and excepts to an instruction submitting an issue not raised by the petition, and no attempt is made to amend to conform to the proofs, the giving of such instruction is error. *Ellsworth v. Newby*..... 285
24. ———: PEREMPTORY: SPECIFIC INQUIRIES: APPEAL AND ERROR. When a party requests a peremptory instruction in his favor and afterwards requests and obtains the submission of specific inquiries of fact to the jury covering all essential matters in issue and the jury returns a verdict for his adversary, a motion for a new trial on the ground of insufficiency of evidence raises the same questions as that raised by the request and only one of such rulings need be determined in the disposition of the case in this court. *St. Joseph & G. I. R. Co. v. McCarty*..... 626
25. ———: SUBMITTING QUESTION THAT COULD ONLY BE ANSWERED IN ONE WAY. It is error to submit to the jury a question upon which there could be but one finding under the evidence. *Ellsworth v. Newby*..... 285
26. Issue of Fact: WITHDRAWAL FROM JURY. A party to an action is entitled to have his theory of the case, when supported by the pleadings and evidence, submitted to the jury; and it is error for the trial court to withdraw from the jury the consideration of a material issue of fact. *Morrill v. McNeill* 220
27. Misconduct of Counsel: NEW TRIAL, GROUND FOR. If counsel, against objection, persevere in arguing to the jury upon pertinent facts not before the jury and expressly excluded by the court, this, on exception duly taken, may be ground for a new trial, or for a reversal. *Courier Printing & Publishing Co. v. Wilson*..... 136
28. Objection to Exhibit Where Part Admissible. An objection to an exhibit as a whole is properly overruled where a part of it is admissible. *Skow v. Locke*..... 176
29. Verdict Sealed: COMPUTATION: JURY PERMITTED TO COMPLETE VERDICT. Where a jury, under the directions of the court and with the consent of the parties, has returned a sealed verdict, and separated with instructions to return into court at a day to which an adjournment was taken, and upon said adjourned day, it appearing by their verdict when read in their presence that they had failed to compute and insert the amount of the recovery therein, it is proper practice for the court to instruct them to retire, make such computation and complete the verdict by inserting the amount of recovery. *Canon v. Farmers' Bank of Cook*..... 348

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30. **Witnesses: EXCLUSION: DISOBEYANCE OF ORDER: EFFECT ON PARTY CALLING.** The fact that a witness has disobeyed an order for the separation and exclusion of witnesses will not operate to deprive the party whose witness he is of the benefit of his testimony if such party is himself without fault. *Murray v. Allerton*..... 291
31. ———: ———: **KNOWLEDGE OF PARTY OF DISOBEYANCE OF ORDER: EFFECT.** But where the order has been disobeyed with the knowledge or consent or by the procurement of the party seeking to use the witness, the court may in its discretion refuse to admit the testimony. *Idem*.

TRUST DEEDS. See TRUSTS, 3-5.

TRUSTS. See CREDITORS' SUIT, 13. MORTGAGES, 68. QUIETING TITLE, 4-6. VENDOR AND PURCHASER, 5. WILLS, 1.

1. **Note and Mortgage of Trustee Given to Settle Judgment: CONSIDERATION: AUTHORITY OF TRUSTEE.** A creditor of the settlor of a trust prior to its creation afterwards obtained three judgments against him. Creditor's suit was brought on one and proceeded to decree. The trustee paid the amount of the decree, but when such decree was satisfied, the two judgments not set up in the suit were entered of record as merged therein and satisfied. Afterwards, to prevent further proceedings, cost and expense, the trustee gave a note and mortgage in settlement of the judgment remaining unsatisfied of record, which did not exceed the amount still actually due the creditor. *Held*, That there was sufficient consideration therefor and that such course on the part of the trustee was proper and within his authority. *Stitzer v. Whittaker* 414
2. **Power of Trustee to Settle Claim Before It Becomes a Lien.** In order to obviate costs and expense, the trustee may dispense with all matters of form or procedure and settle a claim which is about to be made a lien upon the trust estate before it is judicially established as such. *Idem*.
3. **Trust Deed: CONDITIONS AS TO RECONVEYANCE: PAYMENT OF UNSECURED DEBTS.** Where a trust deed is made to secure the payment of certificates of an insolvent bank and contains a condition that upon the payment of the sum of ten thousand dollars to the trustee the property shall be reconveyed to the grantor, the payment of such sum to the trustee entitled the grantor to a reconveyance, but the purchase by the grantor of debts owing by the bank and especially of debts of a class not secured by the trust deed, does not release the trust estate from liability. *Michigan Trust Co. v. City of Red Cloud* 722

TRUSTS—Concluded.

4. ———: **EXTENSION OF PAYMENT: POWER OF GRANTORS OVER CONDITIONS OF SALE.** Where the creditors of a bank agree to an extension of time of the payment of their claims on the condition, among others, that certain of the stockholders of the bank shall secure the payment of such claims by the execution of a trust deed to real estate, the grantors in such deeds can not, by an agreement among themselves and without the consent of the creditors, determine the order in which the trust property shall be sold, or compel the creditors to exhaust the property of one before that of another is resorted to. *Idem.*
5. ———: **FORECLOSURE: PARTIES.** One of several parties whose debt is secured by a trust deed may maintain an action to foreclose the same on behalf of himself and the other parties interested in the security, and the court will distribute the fund arising from a sale of the property among those entitled thereto. *Idem.*
6. **Trustee May Do What Court Would Order Done.** A trustee may do, without a decree or order of court, that which the court would order or decree him to do on a showing made. *Stitzer v. Whittaker*..... 414

UNDUE INFLUENCE, See **WILLS**, 3.

VACATION. See **APPEAL AND ERROR**, 34.

VALUE. See **APPEAL AND ERROR**, 18. **MORTGAGES**, 17, 28. **PARTITION**, 2. **VENDOR AND PURCHASER**, 1.

VENDOR AND PURCHASER. See **PRINCIPAL AND AGENT**, 2, 3.

1. **Caveat Emptor: REFUSAL TO GIVE INSTRUCTION OF FRAUD: PRESUMPTION OF NEGLIGENCE.** Where negotiations for the sale of certain lots were pending six months, and during that time the purchaser examined them and the situation and conditions surrounding them, and sometime thereafter completed the purchase, the court properly refused to instruct the jury that the fact that the price paid was largely in excess of the actual value of the lots, raised a presumption of fraud in the transaction. At most, these facts would only raise a presumption of negligence or error in judgment on the part of the purchaser. *Canon v. Farmers' Bank of Cook* 348
2. **Notice of Lien, Actual: EFFECT.** One who purchases land with knowledge or notice that another holds a lien against the same to secure the payment of a debt, takes the land subject to such lien although the same has not been recorded. *Michigan Trust Co. v. City of Red Cloud*..... 723
3. **Rescinding: BY AGREEMENT: RETURN OF PAYMENTS.** Where rescission occurs by virtue of a written contract or agree-

VENDOR AND PURCHASER—Concluded.

ment between the parties, setting out the terms and conditions upon which the contract of sale and purchase shall be rescinded, and no claim with respect to what has been paid by the vendee is reserved therein, the vendee can not recover. *Lowry v. Robinson*..... 145

4. ———: BY VENDOR: RETURN OF PAYMENTS: INTEREST. Where a contract of sale and purchase of land is rescinded by the vendor, the vendee is ordinarily entitled to repayment of the part purchase money paid by him with interest. *Idem*.
5. Trust, Resulting: TITLE TAKEN IN NAME OF STRANGER: HUSBAND AND WIFE. Where one who pays the purchase price of land takes the title thereto in the name of a stranger, the law will by implication raise a resulting trust in favor of him who has paid for the land; but where the one in whose name title is taken stands in the relation of wife to the purchaser, the presumption will be that the conveyance was intended as a gift to the wife. *Solomon v. Solomon*... 540

VENUE, CHANGE OF.

Granted *Ex Parte* Before Return Day: VALIDITY. An order of a justice of the peace, granting a change of venue, made on an *ex parte* hearing and before the return day of the summons, is void. *Martin v. Mershon*..... 174

VERDICT. See APPEAL AND ERROR, 19, 23, 58, 59. EVIDENCE, 7. TRIAL, 12, 18, 20, 29.

WAIVER. See APPEAL AND ERROR, 6. BENEFICIAL ASSOCIATIONS, 8. FRAUDS, STATUTE OF, 3. TRIAL, 22.

WATERS AND WATER COURSES.

1. Irrigation: BONDS FOR: TAXATION. *Cummings v. Hyatt*, 54 Neb., 35, followed. *Chicago, B. & Q. R. Co. v. Dundy County* 391
2. Pollution of Stream: NUISANCE: INJUNCTION. Where one discharges refuse or sewerage into a running stream, in such quantities and in such a manner that the waters therein become foul, polluted and contaminated, emitting noxious gases and odors, and thereby endangering the health and enjoyment of those living along the banks of such stream, interfering with the proper and customary use of their property, equity has power to restrain the acts from which such consequences flow. *Todd v. City of York*..... 763
3. Surface Waters: DAMAGES: EVIDENCE. Objections to the admission of certain evidence examined and held not to be well taken. *St. Joseph & G. I. R. Co. v. McCarty*..... 626
4. ———: ———: EVIDENCE SUFFICIENT. Evidence held to be sufficient to support the verdict of the jury. *Idem*.

WARRANTS. See MUNICIPAL CORPORATIONS, 12.

WILLS. See PLEADING, 4.

1. **Bequest: CONVEYANCE IN TRUST: ACTION BY HEIRS.** *In the Matter of the Estate of William C. Bissell, Deceased: Thomas v. Holman* 413
2. **Construction: BEQUESTS.** A will contained a specific bequest to one living child and a clause bequeathing "all the residue of my estate, real and personal, to my other children," naming them, "share and share alike," and also a condition that "if any one of my children shall die in my lifetime, leaving issue or descendants, I direct that his or her share shall not lapse, but shall be paid to such descendants in equal proportions." *Held*, That the heir at law of a child who was deceased before the execution of the will is not entitled to participate in the distribution of the residue of the estate under this provision. *Bollinger v. Knox*..... 811
3. **Instructions: MENTAL INCAPACITY: UNDUE INFLUENCE: EVIDENCE INSUFFICIENT.** Evidence examined, and *held* to warrant the instruction given by the trial court that there was no evidence of mental incapacity on the part of the testator, or of undue influence on that of the beneficiaries under the will. *Elliott v. Elliott*..... 833
4. **Signature: EVIDENCE SUFFICIENT.** Evidence in this case examined, and *held* to sufficiently show that the will in question was signed by the draftsman, in the testator's presence, at his previously made request. *Idem*.

WITNESSES. See APPEAL AND ERROR, 60, 61. EASEMENT. EVIDENCE, 15. TRIAL, 30, 31.

1. **Competency: PRIVILEGED COMMUNICATIONS.** Communications not confidential in their character, and whose proof is necessary to effectuate the instrument, in preparing which the attorney was engaged, are not objectionable on this ground. *Elliott v. Elliott*..... 833
2. ———: ———: **ATTORNEY AND CLIENT: STATUTES.** Section 333 of the Code prevents the giving in evidence by a lawyer, only of confidential communications properly entrusted to him in his professional capacity. *Idem*.
3. ———: **STATUTORY CONSTRUCTION.** The word "transaction," as used in section 329 of the Code of Civil Procedure, embraces every variety of affairs the subject of negotiations, actions or contracts between parties. *Smith v. Perry*, 52 Neb. 738. *Harte v. Reichenberg*..... 820
4. **Expert: EVIDENCE: RAPIDITY OF MOTION: STREET RAILWAYS.** A witness need not be an expert in order to be permitted to give his opinion of the rapidity of motion of familiar objects like railway trains and street cars, but he must be shown to have had, and to have availed himself of, an

WITNESSES—Concluded.

opportunity for observation in the case in hand. *Mathieson v. Omaha Street R. Co.*..... 743

5. ———: ———: ———: ———. A non-expert who can testify to the rate of speed of a street railway car, only as the result of a mathematical calculation made after the event, is not a competent witness on the subject. *Idem.*..... 747
6. Impeachment: FOUNDATION FOR: DECLARATIONS AGAINST INTEREST BY PARTY: EVIDENCE. Where it is desired to impeach a witness by showing statements made by him contradictory to his evidence given upon the trial, his attention must be called to the particulars of the conversation upon which it is proposed to contradict him, as well also as to the time when, the place where, and the person to whom he is supposed to have made the contradictory statements. The declarations of a party to the action made against his own interest, are always admissible evidence, and may be shown without calling his attention to the time and place of such declarations, or the party to whom they were supposed to be made. *Dunafon v. Barber.*..... 613

WORK AND LABOR.

Evidence Sufficient. Evidence examined, and held to support the verdict of the jury. *Courier Printing & Publishing Co. v. Wilson* 136

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